# AN
# Exact Abridgement
## OF THAT
## EXCELLENT TREATISE
## CALLED
## *DOCTOR* and *STUDENT.*

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CICER. ORAT.

*Legum idcirco ſervi ſumus, ut liberi eſſe poſſimus.*

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# TO THE READER.

IS it therefore more ſubject to appoſition, becauſe what was before private, is now expoſed to publick uſe? Or rather ſhall not his ingenuous diſpoſition be, if not applauded, yet at leaſt acquited, that for common benefit offers himſelf, his expence of care and charge to a generall acceptation?

## *To the Reader.*

What is but even now offered to view, or that whereof there is only a preſent notion, may truly be called New: And therefore this Treatiſe, though formerly thus compoſed, and ſo imprinted for the Authors ſole uſe and delight, as to the World is nevertheleſſe now an Infant, tender, apt for all impreſſions of Frowns or Affection. Let it not periſh in your hand, whoſe help it implores, whoſe advantage is the cauſe of its birth, is life of its being.

Although it affects an acute conciſe expreſſion, of what was formerly in a more copious ſtyle delivered, yet ſo juſt is it to it ſelf, the Author and all, that what's materiall, remains nothing obſcured or impeached.

The Definitions, Diviſions, Explanations, Examples of *Law* tempered

pered, improved by *Equity* and *Conſcience*, make a compleat Diſcourſe, the practiſe cauſeth, continueth a perfect Weal-publick, a ſecure Government: And by how much former times were in this more chaſte and curious, ſo much more valuable is this Work, more happy the uſe and application.

To oppoſe or diſpute Maxims and Principles is not the wiſeſt labour; ſo to commend what is known Excellent, is to gild Gold, a fruitleſſe and frivolous endevour. The name of the Book proclaims its own eſteem, whereto nevertheleſſe the venerable approbation of men, famous for their knowledge and experience in the Lawes of *England*, is no ſmall addition of worth and reputation. An expreſſion of what's well intended, iſſues with the greater confidence; and

what's well accepted, needs no Apology: The Senſe of the one, the Hopes of the other produce this, That an Epiſtle to this Book, is of Courteſie, not of Neceſſity.

*J. L.*

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*THE END*

# St. *Germans* Book

OF

The *Grounds* of the *Laws* of *England* and of *Conſcience.*

OR,

An Exact Abridgment of that Exquiſite Treatiſe called

# *Doctor and Student.*

DIvines treat, in manet following, of four Laws; The Law Eternal, The Law of Nature of reaſonable Creatures, or the Law of Reaſon, The Law of God, and the Law of Man: upon three of which Laws, viz. The Law Eternal, The Law of Nature, and The Law of God, all good Laws, and conſequently the Laws of England muſt needs be grounded.

Cap.

## CAP. I.

THe reason of the wisdom of God, moving all things by wisdom made to a good end, is called the Law Eternall. This was the first Law, and all other Laws are derived of it: Insomuch that every man that hath right and title to that he hath rightfully, hath it of the right wise Judgement of the first Reason, which is the Law Eternall. And it is this Law that is written of *Prov.* 8. Per me Reges regnant, & legum conditores justa discernunt; and although, Quæ Dei sunt nemo scit nisi Spiritus Dei, yet so much thereof as is necessary for us to know, is shewed us by God three wayes, viz. by natural reason, and then it is called the Law of Nature: by heavenly revelation, and then it is called the Law of God: and by the order of a Prince, and then it is called the Law of Man: which three Laws having severall names, as they be shewed unto Man, are called in God one Law Eternall.

## CAP. II.

THe Law of Nature, &c. is a Law written in the heart of every Man, Christian and Infidell, teaching them by the natural light of understanding, what is to be done, what to be fled in the course of this life; which Law being written in the heart, is never changeable by diversity of place or time, although it be

be obscured by sin and evill custom, wherefore the Law of man was necessary to add hereunto. Against this Law any Prescription, Statute, or Custom is void: And all other Lawes, as well the Law of God, (as to the acts of Man) as others be grounded hereupon. This Law expounds the generall rules of the Law of Man, and restrains them if they be not consonant unto it: It teacheth that good is to be loved, evill to be fled; That thou shalt do as thou wouldest another should do to thee; That we do nothing against truth; That a man live peaceably with others; That Justice is to be done to every man, wrong to none. And it suffereth many things, As to repell force with force, To defend himself and his goods against an unlawfull power. In that the Law whereby all things were in common is changed, it was manifest that it was never the Law of Nature, but used only for the necessity of the time, for the Law of Nature, as abovesaid, is unchangeable.

## Cap. III.

The Law of God, is given by revelation to creatures reasonable, shewing us the will of God, willing us to do a thing, or not to do it, for obtaining felicity eternall, such be the Lawes of the old and new Testament called Morals: But Lawes shewed by revelation of God, for the politicall rule of the people called Judicials, are excluded by the words of

obtaining felicity eternal. And Laws made by man are sometimes called the Law of God; As when they take their principall ground upon the Law of God, and are made for conservation or declaration of the faith, as divers Laws, Canons, and also divers Laws made by the common people sometimes do. But all Canon Laws are not the Law of God, for some of them are made for the political government of the people. There are four reasons why this Law was necessary, besides the law of Reason, and the Law of Man: 1. Because man is ordained to felicity eternall, and this directeth him to that end 2. Because Mans Law is many times uncertain, by reason of the uncertainty of mens judgments, &c. 3. Because it belongeth to perfection, that man be well ordered inwardly also, where man only makes laws of outward things. 4. It would hurt the Common-wealth, that the Law of man should punish all offences, as is of contracts which be suffered for the Common-wealth, though many offences rise thereby, then to the intent no evill should be unpunished, this Law was necessary.

## CAP. IV.

THe Law of Man, or Law positive, is described as necessary and probably following of the Law of Reason, and of the Law of God, and in every Law of man well made, is somewhat of the Law of Reason, and of the Law of God. That such Law be righteous, two thing

things be necessary; Wisdom to judge of the convenience, and authority; for Lex is derived of Ligare, which the sentence of a wise man without authority doth not. These properties be required in it, if it be a good Law, viz. That it be honest, right, rightwise, possible, convenient for the place and time, necessary, profitable, manifest, not mixed with private wealth, but made altogether for the Common-wealth. The Laws of Man, not contrary to the Law of God, nor of Reason, must be observed in the Law of the soul, and he that despiseth them resisteth God. And where, for that evill men forbear to offend for fear of pain, the Law of God commandeth, that the people shall take away evill from amongst themselves, whereupon pains are with convenience ordained; these are a conformity to the Law of God, but yet not so, but that other pains might be ordained, standing the first principles: This therefore is most commonly called the Law of man.

## CAP. V.

The Law of England is more specially grounded by the Student of the same Laws, upon six principles, viz. The Law of Reason, The Law of God, General Customes, Maximes, Particular Customes, and Statutes.

¶ When any thing is grounded upon the Law of Nature, the reasoning in the Laws of England is not what the Law of Nature

will, but they say, that Reason will that such a thing be, or that such a thing is against reason. This Law of Reason is divided into the Law of Reason primary and secundary: By the Law of Reason primary are prohibited Murder, Perjury, Deceipt, Breaking the peace, &c. and by the same it is lawfull to defend himself against an unlawfull power, so he keep due circumstances. The Law of Reason secundary is again divided into secundary general, and secundary particular: General is grounded on the general Law of property, by which branch Disseisins, Trespasse in lands and goods, Rescous, Theft, unlawfull detaining another mans goods, &c. are prohibited by the Laws of England: and by the same Law satisfaction is given for trespasse, and restitution must be made of goods detained, debts paid, covenants fulfilled, &c. and because Disseisins, &c. had not been known, if the Law of property had not been, therefore all things derived by reason out of the said Law of property, be called the Law of reason secundary general, for the Law of property is generally held in all civill Countries. Secundary particular, is the Law derived upon Customs general or particular, Maximes and Statutes of this particular Realm, and is so called, because the reason is derived of a Law that is only holden for Law here: For example; by a Law of Custom in England, if a man take a Distresse lawfully, he may put it in Pound overt, there to remain till he be satisfied of that he distrained for, then if these beasts die there for want of meat, if

by

be demanded at whose perill it is, the Law of reason will at the perill of the owner, for that there was no default in him that distrained. All birds, fowles, wilde beasts of the forest and warren, &c. feræ naturæ are excepted by the Laws of England, out of the generall Law of property: But Herons and Hawkes egges belong to the owner of the ground.

## Cap. VI.

FOr declaration that the Law of God is a ground of the Law of England: It is inquired in many Courts of this Realm, whether any hold opinions against the Faith, &c. Also any generall Custom or Statute made against the Law of God, As that no almes should be given, were void, and yet the Statute of 23 E. 3. against almes to be given to haitant beggers is good, for it observes the intent of the Law of God. Also he that is excurled shall maintain no action in the Kings Courts (except in few cases.) so that the excommunication be certified under the seal of the Ordinary. The Law of England also by authority of this ground admitteth the spirituall jurisdiction of tithes and offerings. And in many cases the Kings Judges must judge after the Law Ecclesiasticall; As if a writ of Right of ward be brought of the body, &c. and the Tenant confessing the tenure and nonage of the infant saith, that he was married in the life of his Ancestor, &c.

to thereupon they are at iſſue, and the Jury give their verdict at large, that the Infant was married in the time of his Anceſtor, but that his wife living the Anceſtor ſued a divorce, whereupon a ſentence of divorce was given, and that thereupon there ſued an Appeal, which yet dependeth indiſcuſſed, and pray the advice of the Court, whether the Infant ſhall be ſaid married or not, hanging the Appeal; In this caſe a Judgement conditionall ſhall be given, &c. So in other caſes. And the Eccleſiaſtical Judges alſo muſt in many caſes give their ſentence according to the Laws of the Realm; as if two Joyntenants be of goods, and one of them deviſeth his part to A. and maketh his companion his Executor and dies, and now A. ſueth for his legacy in the Spiritual Court, they ought to adjudge the deviſe void, becauſe by the Common Law the part accrues to the Survivor: So if one outlawed deviſeth his goods and dieth, and the King ſeiſeth the goods, and giveth them again to the Executor, and now the Legatory ſues a Citation in the Spiritual Court againſt the Executor, to have execution of this Legacy, they muſt according to the Common Law adjudge the deviſe void, and yet in their Law there is no ſuch forfeiture of goods by Outlawry.

B. Cap.

## Cap. VII.

The Generall Customes of the Realm, be properly called the Common Law, and it is alwayes determined by the Judges, and not by Jury, whether there be any such Generall Custome or not. These and the Maxims whereon most part of the Law of this Realm dependeth take their effect by the old Custome of the Realm, and the King at his Coronation taketh a solemn Oath, That he shall cause all the Customes of his Realm to be observed. For examples of generall Customs: ¶ Generall Custome is the ground of the Courts of Chancery, Kings Bench, Common Pleas, and Exchequer, which be Courts of Record, and none may sit as Judges in any of these Courts but by the Kings Letters Patents. So is it of base courts, as County court, Sheriffes Torne, Court baron, and court of Pypouders which is incident to every Fair and Market, which Custom is of such authority, that the names nor jurisdiction of the said Courts cannot be altered but by Act of Parliament. ¶ By this Generall Custome, no man shall be imprisoned, disseised or otherwise destroyed, but he be put to answer by the Laws of the Land, which is confirmed by Magna Charta cap. 26. ¶ Likewise all men, small and great, shall do and receive Justice in the Kings Courts, which is confirmed by the Statute Marlb. cap. 1. ¶ Also the eldest son only shall inherit

inherit: If there be no sons, all the daughters, so of sisters and other kinswomen, for default of son daughter, brother, and sister, the next of kin of the whole blood, how many degrees soever he be off, and if there be no heir, the Land shall escheat to the Lord of whom, &c. ¶ Land shall never descend from the son to the father, or other Ancestor in the right line, but rather escheat. ¶ If an Alien have a son that is an Alien, and now is made Denizen, and hath another son, and purchaseth land and dies, the youngest shall inherit: So note this differeth from the case where the elder brother is attainted in the life of his father, but if the Alien had purchased land before his indenization, the son born after should not have inherited that, but the King should have had it. Also note, the King may make a Denizen by his Letters Patents, but not an Heir, but by Act of Parliament, because this should be prejudiciall to him that is Heir, or the Lord by Escheat. ¶ The eldest shall inherit the middle brother. ¶ Land descends on the part of the father, if the son die without issue the discent shall be to the heirs on the part of the father, And if the father purchased the land, then in default of such heirs, to the heirs on the part of the fathers mother, but by no means to the heirs on the part of the sons mother, but shall rather escheat, but if the son had purchased the land, otherwise it is. ¶ If the son purchase and die without issue, the discent shall be to the uncle, and not to the father, but if the father at any time after have another child by the same wife, he shall enter upon the uncle

as

as heir to the brother. (B. So where a daughter entreth as heir, & now a son is borne, but this is to be understood only of Discents, & not of Purchases, for if the daughter enter as next heir where the mother assents to a Gavelet, or for a Condition broken, or into a Perquisite of a villein which she hath by Discent, though a son be born after, the daughter shal retain the land: So of a remainder. ¶ By the Custom of the Realm the child born before marriage is bastard, and shall not inherit. ¶ Goods and Chattels shall go to the Executors ordinary, or Administrator, and not to the Heir. ¶ The husband shall have all Chattels personals that his wife had at the time of their espousals, or after, and Chattels reals if he survive his wife, or alien them in his life time, or else they shall remain to the wife if she survive, but personals go to the Executors of the husband. ¶ The husband shal be Tenant by the Courtesie of a possession in fait, of the whole land of the wife, &c. ¶ The wife shall be Tenant in dower of a possession in fait or law, of the third part of the land of her husband, &c. so she be of the age of nine years or above at the death of her husband, though the husband be under nine, Vet. N. B. fol. 7. that if the husband be not xij. years of age, the wife shall not be indowed though she be nine. ¶ After the death of Tenant by Knights service, the Lord shall have the ward and marriage of his heir within age till xxj. but if the heir be of full age, he shall only pay relief, which was uncertain till the Statute of Magna Carc. cap. 2. But thereby for every whole Knights fee

it

it is C.s. whole Barony C. marks, whole Earldom C. li. and so after the rate: If the heir be a woman and within xiiii. at the death of the Ancestor, by the Common Law she should have been in ward til xiiii. but by West. 1. cap. 22. she shall now be in ward in such case till xvi. but if she be xiiii. or above at the death of the Ancestor, she shall be out of ward, and then shall pay relief only. ¶ The heir in Socage within xiiii. at the death of his Ancestor, his next friend to whom the land may not descend, shall have the wardship of his body and lands, till xiiii. and then he may enter, and at his age of xxi. years the Gardian shall accompt to him for the profits thereof received. ¶ The heir in Socage shall for his relief double his rent the year following the death of his Ancestor, which relief he must pay, though he be within age at the death of his Ancestor. ¶ A Freehold passeth not by fe offiment, gift or lease without livery: But by surrender, partition or exchange it passeth without livery. ¶ A Devise of land by will is void, (*See now the Statute of* 32 *H.* 8.) but good of a use. Also it is good in London of land by the Custom, if it be inrolled. ¶ A lease for years is but a Chattel, and therefore passeth without livery: Otherwise it is of a lease for life, for that is a Freehold. ¶ A man may distrain for a rent service of common right, so for a rent reserved on a gift in tail, lease for life, years, or at will, and the beasts of his Tenant as soon as they come on the land, but not of a stranger till they have been levant and couchant

chant there, for debt, accompt, treſpaſſe, reparations, &c. a man may not diſtrain. ¶ All iſſues joyned between party and party in Courts of Record (except few) ſhall be tryed by xii. lawfull men of the Viſne, &c. of no affinity to the party; In Courts not of Record, as Country court, Court Baron, Hundred, &c. by oath of the parties, and not otherwiſe, unleſſe by aſſent it be tryed by the homage. Note that Lords, Barons, and Peers of the Realm, are exempted out of ſuch trials: but if they will voluntarily be ſworn it is no error: Alſo if they will they may have a Writ out of the Chancery to the Sheriffe, to prohibit him to impanell them. And theſe ſaid Cuſtomes cannot be proved by reaſon, although they be reaſonable, which with the old Cuſtome of the Realm is ſufficient authority for them in our Law. But yet a Statute made againſt ſuch a general Cuſtome is good, becauſe theſe Cuſtomes be not meerly the Law of Reaſon. ¶ The Law of property may alſo be put under this ground, for it is a Law of Cuſtome and not of Reaſon.

## Cap. VIII.

The Maximes have alwayes been taken for Law in this Realm, which is ſuch authority unto them, that there need no reaſon be aſſigned for them, for they may not be denied: which is a Maxime, which not, ſhall alwayes be determined by the Judges, and not by lit. men; All caſes like them, and neceſſarily

reflarily following of them, are to be reduced to Law, which that they may themselves conveniently be applyed to them, most commonly some reasons are alligned for the Maximes. The Generall Custom of the Realm is the warrant for these Maximes, as it is for the Generall Customes: and the difference between Generall Customes and the Maximes is, only the Customes are generally known, the Maximes but only to the learned in the Law, which is the cause they are placed as severall grounds, be that list may take them as one. Examples of Maximes. ¶ Escuage uncertain makes Knights service. ¶ Escuage certain, Socage. ¶ Tenure by Castle gard is Knights service, but he holdeth not by Escuage: Tenure by 12. s. to the Gard of a Castle is Socage. ¶ A Discent tolleth an Entry. ¶ Prescription makes no right in land. ¶ Of Rent and profit Appender out of land it maketh a Right. ¶ Limitation of prescription generally taken is from the time that no mans minde runs to the contrary. ¶ Assignes may be made of lands given in fee, for life, or years, though Assignes be not mentioned: so of a Rent: contrary of a Warranty, and of a Covenant. ¶ A Condition to avoid a Freehold cannot be pleaded without Deed, but to avoid a Chattell it may. ¶ Release or Confirmation by him that at that time hath no right is void, though a Right come to him after, except it be with Warranty, for then it barreth of all the Right that he shall have after the Warranty made. ¶ A Right or title of action that only depen-

deth

deth in action cannot be granted but to the Ter-Tenant, or to him that hath the reversion or remainder of the Land. ¶ In an action of Debt upon a contract, the Defendant may wage his Law, otherwise it is upon a lease for years, or at will. ¶ If an Exigent in case of Felony be awarned, the party hath thereby forthwith forfeited his goods to the King. ¶ If the son be attainted in the life of the father and purchase his pardon, and now the father dieth, the land shall escheat to the Lord of the Fee, though there be a younger brother, for the blood is corrupt, and the father dieth without heir in law. ¶ If an Abbot or Prior alien the lands of his house and die, though his successor have right he may not enter, but is put to his action. ¶ If a villein purchase lands, and his Lord enter, he shall have the land as his own, but if the villain alien before the entry of the Lord, the alienation is good. Like Law of goods. ¶ If a man steal goods to the value of xii d. or above, it is Felony, and he shall die for it; if under xii. d. it is Petty Larceny, and he shall not die, but be otherwise punished at the discretion of the Justices: but how little soever is taken from a mans person feloniously is Robbery, and the party shall die for it. ¶ He that is attained upon an indictment of Felony, shall be admitted in favor of life to challenge 36. Jurors peremptorily, (vide ore Stat. 15 H. 8. cap. 13.) but if he challenge above, the Law taketh him as one that refuseth the Law, because he hath refused three whole Inquests, and therefore he shall die, but with

cause

rauſe he may challenge as many as he pleaſe: Such peremptory challenge ſhall not be admitted in an Appeal, becauſe it is at the ſuit of the party. ¶ The land of every man is in Law incloſed from others, though it lie in the open field, and the Writ of Treſpaſſe ſhall be Quarum clauſum fregit. ¶ Rents, Commons of paſture, Turbary, Reverſions, Remainders, &c. which lie not in manual occupation, may not be granted without Deed. ¶ He that recovereth debt or dammages by an action, wherein a *Capias* lay in the Proteſſe, may within the year have a *Capias ad ſatisfaciendum*, otherwiſe he muſt take a *Fieri facias*, or *Elegit* within the year, or a *Scire facias* after the year, or within if he will. ¶ A Releaſe or Confirmation to him, that at that time hath nothing in the land, &c. is void, except to bouchee, &c. ¶ The King may diſſeiſe no man, ne be diſſeiſed, nor have a reverſion or remainder pulld out of him. ¶ No Freehold may be given to the King, nor derived from him, but by matter of Record. ¶ Sometimes no man ſhould have a Writ of Right, but by ſpecial ſuit to the King, and for a fine to be made in the Chancery for it: but theſe Maxims are changed by Mag. Chart. cap. 16. Nulli negabimus, nulli vendemus rectum vel Juſticiam. ¶ The Proceſſe in actions real and perſonal are to be referred hither.

Cap.

## Cap. IX.

Cases doubted whether they be onely Maxims, or grounded upon the Law of Reason. ¶ He that commandeth the trespasse, is a Trespasser. ¶ The Accessary shall not be put to answer before the Principall. ¶ If an Abbot had bought a thing that had come to the use of the house, and died, his successor should be charged. ¶ He that hath the possession of lands, though by disseisin, hath right against all men, but him that hath the very right. ¶ If an action reall be brought against him that hath nothing in the thing demanded, the writ shall abate. ¶ The alienation of the Tenant hanging the Writ, for his entry into Religion, or if he be made a Knight, or being a woman take an husband, shall not abate the Writ. ¶ If land and rent issuing out of the same come into one mans hands of like estate and surety of title, the rent is extinct. ¶ If land descend to him that hath a former right, he shall be remitted to his better title, if he will. ¶ If two titles concur, the eldest shall be preferred. ¶ A man shall yeeld dammages for the hurt of his beasts in his neighbours ground, though he knew not they were there. ¶ If a Demandant or Plaintiffe enter into the thing demanded hanging his Writ, the Writ shall abate.

¶ Cap.

## Cap. X.

PArticular Customs not being against the Law of Reason, nor of God, although against the Common Law, are holden for Law, and if it rise in issue, whether there be any such Particular Custom or not, it shall be tried by Jury, and not by the Judges: except the Custom be of record in the same Court. Examples of Particular Customs. ¶ By a Custom in Kent called Gavelkinde, all the brethren inherit together, as sisters at the Common Law. ¶ By a Custom in Nottingham called Borough-english, the youngest son shall inherit. ¶ In London, Freemen may by their Testaments inrolled bequeath their lands to whom they will, except to Mortmaine, and being Citizens & Freemen to Mortmaine. ¶ In Gavelkinde though the father be hanged, the sonne shall inherit: for the Custom is, the father to the bough, the sonne to the plough. ¶ In some places the wife shall have halfe the lands of her husband in name of her Dower, so long as she liveth sole. In some place the husband shal have halfe the inheritance of the wife, though he had no issue by her. ¶ In some place an Infant when he is 15. yeares of age may make a feoffment, and in some place when he can measure an Ell of cloth.

## Cap. XI.

Statutes are made by the King (who is the head and moſt chief and principall part of of the Parliament) the Lords ſpirituall and temporall, and the Commons aſſembled in Parliament, in caſes where the Law of Reaſon, the Law of God, Cuſtoms, Maxims, nor other grounds of the Law ſeeme ſufficient to puniſh the evill, and reward the good. And oftentimes two or three of theſe grounds of the Law of England muſt be ioyned together to maintain the Plaintiffes action: As if a man enter into another mans land by force, and make a feoffment for maintainance to defraud the plaintiffe of his action, here three grounds of the Law maintain the Plaintiffes action of Treſpaſſe or Aſſiſe, viz. the Law of Reaſon, whereby the unlawfull entrie is prohibited; the Statute of 8 H. 6. cap. 9. whereby treble damage is given: and the Cuſtom of the Realmes, which is, that the damages ſhall be aſſeſſed by Jury.

## Cap. XII.

If an action of Debt be brought upon an Obligation, it is a maxime, that the Defendant ſhall not plead that he oweth not the money, but muſt have ſome ſufficient releaſe or acquittance in writing, or other matter of as high nature as the Obligation to plead in bar, the

reason whereof is, to avoid the inconvenience that by Nude paroll, or a bare averment an Obligation should ells be avoided: But the Law intendeth not notwithstanding, neither is that the money of right ought to be paid againe, where the party taketh no acquitance, or loseth the same, for that were against conscience, therfore if such matter happen, the partie hath his remedie by Subpena: This case, as it seemeth, is to be understood of a single Obligation, for if it were with a penaltie, 41. E 3.25. by Thorpe, and 46.E.3.29. and B. Fairs 40. for that the Obligor is bound there on paine of forfeiture of the penaltie to pay, &c. at his perill, therefore he may plead payment without an acquitance: So it seemeth of an Annuitie with a Nomine Pœnæ, otherwise not, unlesse the Annuitie be by prescription, where in that he is not charged by deed, he may discharge himself without deed, 37 H. 6. 19.

## Cap. XIII.

What Conscience is after the opinion of Divines, and that it may the better be understood, first is shewed what Synderisis is, then what Reason is, then what Conscience is. ¶ Synderisis is a naturall power of the soul, set in the higher part thereof, moving it to good, and abhorring

ring evill, and therefore Synderisis never sinneth nor erreth. This Synderisis is the beginning of all things that may be learned by speculation or study, and ministreth the generall grounds thereof; And also of all things that are to be done by man, & is therefore called by some men the Law of reason, for it ministreth the principles of the Law of Reason, which be in every man by nature, in that he is a reasonable creature.

## CAP. XIV.

REason is that which maketh man excell beasts, and like to the dignity of Angels, discerning truth from falshood, evill from good. It is divided into the higher part, which reasoneth by heavenly Laws or Reason what is to be done, and into the lower part, which worketh in governing temporall things, and groundeth her Reason much upon the Law of man, whereby she concludeth, that this is expedient or not for the Common-wealth, so that these two being one in effect, differ by reason of their working.

## Cap. XV.

The word Conscience is compounded of Cum and Scientia, and is as much to say, as knowledge of one thing with another; Conscience so taken is but an actuall applying of any knowledge to such things as be done, whereupon it followeth, that of the most perfect knowledge of any law or cunning, and of the most perfect and pure applying thereof to any particular act of man, followeth the most perfect and pure conscience, and if there be default in knowledge of the truth of such a Law, or in applying the same to particular acts, thereupon followeth an error in Conscience And God hath set Conscience in the minds of every reasonable soul as a light, whereby he may discerne what he ought to doe, and what not.

## Cap. XVI.

Equitie is a right wiseneſſe that considereth all the particular circumstances of the Deed, the which also is tempered with mercy, and such an Equity must be observed in every generall rule of the Laws of man, for Summum jus summa injuria, viz. if thou take all that the words of the Law giveth thee, thou shalt sometimes doe against the Law, therefore Equitie was ordained to temper the rigor of the Law, and it is called by some Epiecia, which is

is no other thing but an exception of the Law of God, or of the Law of Reason, from the generall rules of the Law of man, which exception is secretly understood in every generall rule of every positive Law, and it taketh not away the very right, but only that which seemeth to be right by the generall words of the Law, for it followeth the intent though not the words thereof: and if any Law were made by man without any such exception expressed or implyed, it were unreasonable. For example, In the Law of England there is a generall prohibition, that it shall not be lawfull for any man to enter into another mans Freehold without authority of the owner, or of the Law: yet is it excepted by the Law of Reason, that if beasts driven by the high way escape into another mans ground, he that driveth them may justifie the entry to fetch them out. Also notwithstanding the Statute of 14. E. 3. that no man upon pain of imprisonment should give almes to any valiant begger, yet he that meets such an one so lightly apparelled in such cold weather, that if he be not clothed, &c. he is likely to die before he come to any Towne, may cloth him by the Law of Reason. And the Judges many times may judge after the minds of the makers of Statutes, so far as the letter may suffer.

## Cap. XVII.

A Man may be holpen by Equity in the Laws of England in divers Manners; First by particular grounds which are exceptions from the generall grounds of the Law: As where there is a generall ground that it is not lawfull to enter upon a Discent: yet an Infant, and he that maketh a continuall Claim are excepted. So in divers Statutes, as where by the Statutes of Glouceſt. cap. 6. it is generally prohibited that certain particular Tenants ſhall do no waſte, yet if a leaſe be made to an Infant within years of diſcretion, and a ſtranger do waſt, &c. the Infant ſhall not be puniſhed but is excepted by the Law of Reaſon B. Yet he ſhall be puniſhed for his owne waſte. So if a leaſe be made to a woman covert, ſhe ſhall be diſcharged of waſte after her husbands death by a reaſonable Maxime and Cuſtom of the Realme; Alſo ſuch particular Tenants may cut trees for reparations, and this ſeemeth to be becauſe by the minds of the makers of the Statute this particular caſe ſhould be excepted. So that a man may be excepted ſometimes from the rigor of one Maxim by another Maxim: from the rigor of a Statute by the Law of Reaſon, and ſometimes by the intent of the makers; And in all theſe

caſes

caſes the parties have their helpe by the Common Law in the ſame Court: But where any thing is excepted from the generall Cuſtoms and Maxims of the Law of the Realme, by the Law of Reaſon remedie is given in Chancery by Subpena, if it lie in the caſe, and thereupon an Injunction is obtained to ſtay proceedings at the Common Law: But in ſome caſes there is no remedy but the conſcience of the partie. And although of this terme Equity there is no mention in the Lawes of England to the intent abovelaid: But of an Equity derived upon Statutes, yet of the effect of this Equity mention is made, as when it is argued in the Lawes of England where a Subpena lieth, and where not. And daily Lawyers exhibit bills in Chancery for Subpenas, and the Law will that there ſhall be ſuch remedy in Chancery in divers caſes grounded upon Equities: And then the Lord Chancellor doth order his conſcience after the grounds and rules of the Lawes of this Realm. But for that no record remaineth of ſuch bills, nor of the Writ of Subpena or Injunction ſued thereupon, therefore ſuch remedy in Chancery upon ſuch Equities is not ſet here for a ſeventh ground of the Law: But as a thing neceſſarily ſuffered by the Law.

Cap.

## Cap. XVIII.

If it were ordained by Statute that there should be no remedy upon such Equities, as abovesaid in Chancerie nor elsewhere, such a Statute were against Reason and Conscience: But yet the Statute 4. H. 4. cap. 22. That Judgments given in the Kings Courts shall not be examined in the Chancery, Parliament, nor elsewhere, is a good Law, although thereby the mischief abovesaid may happen; for it was made to eschew the inconvenience that otherwise Plaintiffes, though upon never so good a ground, should seldome come to the effect of their suits: And inconveniences are more provided for in the Laws of England, than mischiefes to particular persons. Also the Statute prohibiteth not equity, but only, the examination of Judgments for the inconvenience abovesaid. And in some cases as aforesaid, there is no helpe by Subpena, nor otherwise for wrongs, but the conscience of the partie: As if the Defendant in an Action brought upon a true Debt will wage his Law: So if in an Attaint the Grand Jurie affirme the false verdict. Also where there can be no sufficient proof, there can be no remedie in Chancerie more than in the Spirituall Court.

Cap.

## Cap. XIX.

WHere the Law ſhall be ruled after Conſcience. This queſtion is not underſtood of the Law of Reaſon or of the Law of God, for they may not be left, nor of the Law of Man conſonant unto them made in particular caſes, for Conſcience muſt be ruled after ſuch Laws, as appeareth in the next Chapter: But this queſtion is diverſly to be underſtood; Firſt, many erroneouſly think they may doe with good conſcience all that they ſhall not be puniſhed for by the Law, though the Law warrant them not to do it; As if two Joyntenants be of a wood, and the one ſelleth the wood and detaines all the money, his fellow hath no remedy by Law, for by taking the wood joyntly one put the other in truſt, and the Law leaveth the profits to be ordred according to the truſt: yet in conſcience is he bound to reſtore halfe to his fellow, for that by Law he hath right to halfe the land: ſo there is no default in the Law, but in him that taketh all the profits, and therefore in this and other like caſes, the Law is not to be left for conſcience, but the erroneous opinion abovesaid: So if Tenant in taile be diſſeiſed, and the Diſſeiſor dieth ſeiſed, and the Heire in taile bringeth his Formedon and recovereth the land, though the Law give him no dammages, yet in conſcience the Tenant is to yeeld him dammages from the death of his Anceſtor: So in other actions, whereby a man is to recover

rober his right and no dammages. ¶ Also by some the Law is to be left for Conscience where it estops a man to deny that he hath before, ignorantly and not by his assent, affirmed in Court of Record, or concluded himselfe in otherwise; As if a daughter and heire sue livery with her bastard sister, &c. for though the Law in cases of Estoppel give no remedy, yet it judgeth not that the other hath right. So in case where a verdict passeth against the truth: for at the common Law judgment must be given as it is pleaded and tried, and in the Civill and Canon Law as it is pleaded and proved. ¶ Also the Law is to be left for Conscience, where the cause of that Law doth cease; As if Lessee bringeth an Action of Trespasse against a stranger that doth waste upon the land, and hath judgement of dammages having respect to the 3. dammages that he is to yeeld to him in the reversion, and now he in the reversion dyeth before his action brought, whereby the action of waste is extinct. ¶ Also where a Law is grounded upon a presumption, if the presumption faile, the Law is not to be holden in Conscience.

## Cap. XX.

WHere Conscience shall be ruled after the Law' This question is not only to be understood of the Law of Reason, and of the Law of God, but also of the Lawes of man not contrarie unto them; for such Lawes made by man, that hath thereunto received power from God

God, are made by God. Cases of our Law, where Conscience shal be ruled after the Law. ¶ The eldest son shall inherit at the Common Law, in Borough english the youngest, in Gavelkinde all the brothers, as daughters shall at the Common Law, and so shall they in Conscience, and yet no reason can be given why Conscience should so varie, but that the Law of England, by reason of divers Customs, doth so varie. ¶ If a man make a feoffment of two Acres lying in several Counties, and Livery in one in name of both, the Acre passeth only where the Livery was made, but if both Acres had been in the same County, both had passed, as being put put without consideration, the diversity of the Law maketh the diversity of Conscience. ¶ So if a man make a feoffment of a Manor without the words Cum pertinent', the Demesns and rents passe with Attornement: So of Common pertaining to the Manor, but not Villeines regardant, nor Advowsons appendant, but with the words Cum pertin. they had passed. (B. So thought the words come after the *Habendum*, as Habendum, &c. vnà cum advoc', or Habendum, &c. cum pertin.) But if the king had been the Grantor, the generall words cum pertin. passe not the Advowsons nor Villeines, and the diversity of Law in these cases (put without consideration) make the diversity of Conscience. ¶ So if a man make a Lease for years, yeelding to him and to his heirs a rent, upon condition that if it be behinde by the space of 21. days, &c. that it shall be lawfull to the Lessor and to his heirs to re-enter, the rent is behinde, &c. and

demanded

by the Lessor (as it ought by the Law) and is not paid, and now the Lessor dieth, his heire may here enter, for a title of Entrie descends: but if the Lessor had died after the feast day, and before the fortieth day, and the heire there makes a demand at the fortieth day, in this case he may not enter for nonpayment, neither in Law nor Conscience. ¶ So if Tenant in Dower sow the land, and die before severance, the corne belongs to her Executors, and not to him in reversion: Otherwise it is of grasse and fruits. (B. If Tenant in Dower sow the land, and now takes an husband, and the husband dyeth before severance, the wife shall have the emblements, and not the Executor of the husband: But if the husband had sowed the land, otherwise it is.) ¶ If before the Statute of 32. H. 8. a man seised in fee had devised his land and dyed, his heir had right to the land, for the will was void; but by Cestuy que use it had been good: So in Conscience. ¶ A man grants a rent for life, and leaseth land to the same Grantee for life also, the Tenant alieneth both in fee, he in reversion hath good title to the land for a forfeiture, but not to the rent: So in Conscience. ¶ If lands be given to two women & a woman in fee, and after one of them marrieth the woman, and alieneth the land and dieth, the woman hath right but to a third part: But if the intermariage had been before the feoffment, she had had right to halfe the land: So in Conscience. ¶ If a man have two sonns, one before the other after espousals, and dyeth, the younger is his heir, for he born before

espousals

espousals is in our Law bastard: So in Conscience. So that where any Law is ordained by man for the disposition of lands or goods, not being against the Law of Reason, nor of God, it bindeth also in the Court of Conscience.

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## Cap. XXI.

AN Infant of the age of twenty years selleth his land, and with the money bupeth other Lands of greater value; his feoffment is notwithstanding voidable in Law; for the Law presumeth that an Infant hath not discretion to order himself. (Note notwithstanding the presumption be here against manifest proofe.) And here the Feoffee cannot be holpen in Conscience, for that Conscience here can be grounded upon no Law; for though contracts be by Ius Gentium, yet they be not grounded upon the Law of Reason, nor of God: But the partie is in Conscience bound here only to restore the money and expences. But if a man by a lawfull contract selleth lands, (but the contract of an Infant is void) though the solemnities of Liberie, &c. be wanting, yet the Bargainor is there bound in Conscience to perform the contract.

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## Cap. XXIII.

TEnant for life is impannelled on an Inquest, and soloth Issues and diveth, the Land shall be

be charged with these issues, and they shall be levied on him in the reversion: So if the husband forfeit issues and die, they may be leavied on the land of the wife, which is by a particular Maxime of the Law, being an exception from the generall Maxime, That where two titles concurre the eldest shall be præferred: So likewise in Conscience, for the Law being that for the execution of Justice every man shall be impannelled, it is reasonable there should be a paine to cause him to appeare, which is by forfeiture of issues to the King, which is not inconvenient, though the Law be, that they shall be levied of him in the reversion; for such a condition was secretly understood to passe with the Lease, which the Lessor is to prevent at the making thereof. B. It seemeth hereby that issues lost by Tenant in taile shall be levied upon the issue.

## Cap. XXIII.

TEnant for life or years doth waste, whereby he is to forfeit treble Dammages, and the place wasted by the Law, til Judgment it sufficeth in conscience that he be ready to yeeld Dammages according to the waste, and not the treble Dammages, because they were uncertain, but after Judgement he is bound in conscience to yeeld the treble Dammages and place wasted. So in all popular Statutes, no man is bound in conscience to pay the penalty till it be recovered by

by Law: And he that hath offended such a Statute may not in conscience defend the action and hinder Judgment, to the intent to pay only single Dammages, unlesse he have a true Dilatory, which would be hurtfull unto him if he pleaded it not.

## Cap. XXIV.

A Feoffment upon Condition, that the feoffee shall not infeoffe any other, the Condition is void in Law, for it is incident to the purity of a Feesimple, that he may by the Law, and by the gift of the Feoffor make a feoffment, so that the Condition being contrary to the Law, and contrary to his own former grant, is void in Law: but upon condition that he should not infeoffe such a particular person had been good. And the intent of the parties not according to the Law is void: As if a man intending to give a Feesimple, giveth the lands Habendum to him for ever, an estate for life only passeth: So if a Lease for years be made to a man and his heirs, his intent is void; for by the Law, all Chattels reals and personals go to the Executors: So if land be given to a man and his wife, and a third person, intending each should have a third part, the husband and wife as one person in Law shall take but the moity: So also in conscience the estates being put without recompence: then also is the condition supra void in consticence; for if the Feof-

for should have the land againe in conscience, that conscience can be grounded upon no law, for Conditions are not grounded upon the law of Reason, but upon the Custom of the Realm.

## Cap. XXV.

If a Fine with Proclamation be levied according to the Statute of 4. H. 7. and no claime made within five yeares, the right of a stranger to the fine is thereby extinct: So in conscience: for the Statute was made for establishing the right of lands, and for a peace and quietnesse to the people, which is a good Law, though perase it extinct the right of a stranger, and must be kept in the Court of Conscience, for possessions and the right thereof are subject to the Law, and with cause reasonable may be translated from one to another by Act of the Law, upon which reason by contracts in Faires and Markets the property is altered (except the property be to the King) so the Buyer pay toll or doe other such things accustomed, and have no notice of the former property. And in the Civill Law a possession of another mans goods three years thinking he hath title, giveth the very right in deed.

## Cap. XXVI.

A Recovery used upon alienation of intailed lands, for cutting off the intaile is in this manner;

manner; The Demandant shall suppose in his Writ and Declaration, that the Tenant in Taile hath no Entrie but by such a Stranger, where neither the Demandant nor the said Stranger never had possession of the land, whereupon the Tenant in taile shall appeare, and by assent of the parties shall vouch the common Vouchee, whom he knoweth to have nothing to yeeld in value, and the Vouchee shall appeare, and the Demandant shall declare against him, whereupon he shall take day to imparle in the same Terme, and at the day by assent of the parties he shall make default, whereupon because it is a default in despite of the Court, the Demandant shall have Judgement to recover against the Tenant in taile, and he over in value against the Vouchee: And this Judgment & Recovery in value is taken for a bar of the Taile for ever by reason of the recompence; for by presumption the Vouchee may purchase lands. But it is reasoned, that although such Recoveries, in respect of the multitude of them, be spared, that they stand not with Conscience: for by the Statute of W. 2. cap. 1. when the Ancestor is dead, intailed lands of right belong to the heire, for that he is heire according to the gift: If then thou be commanded not to covet: à fortiore that thou doe not withhold thy neighbors house, &c. Also all Commandements of the Law of man lawfully made, binde in Court of Conscience, and although the Statute should be judged to be made of singularity by some of the Parlament,

advancement of their bloud; yet inasmuch as it is not against the Law of God, nor the Law of Reason, it ought to be observed. And although it may be objected, that that which is ordained by the Law may be anulled by the Law, there is not here like authority for the one as for the other; for the Taile is created by authority of Parliament, the most high Court in the Realme, and the disanulling thereof is by a covinous recovery upon false suppolals And the Statute of 7. H. 8. which some take to be an allowance or fortification to these recoveries, fortifies them not at all: for the Statute gives onely a forme to recoverers to avow which they had not before, as Grantees of reversions had, because the recoverer comes in in disaffirmance of the state of him against whom, &c. so that the Statute respecteth not whether the recovery be against Tenant in Fee or in Taile, or whether it were upon a good title or not. Then as to another objection, viz. Communis error facit jus, that is to be understood that a Custom used against the Law of man in some Countrey shall be taken for a Law, if the inhabitants be suffered so to continue it; but these recoveries, although they have been long used, have alwayes been spoken against: Also this Custom could have no lawfull beginning, and an evill Custom is to be abolished: Also a prescription against a Statute is void: And it is also moved, that inasmuch as there is no executed recompence that the Law hath been taken, that the Heire in taile is not barred of his Formedon, and although the Voucher may

may purchaſe lands after the iſſue hath re-continued his own land, that herein is no inconvenience: for that the iſſue ſhall be barred of the recompence in value, in that he hath continued his owne land againe, and ſo ſhall not have both.

## CAP. XXVII.

A Diſſeiſee makes a gift in tail, the Donee agreeth with the Diſſeiſee, that in conſideration of a releaſe of his right, he ſhall have a Rent charge out of the land, and a common Recovery is had againſt the Donee, to the uſe of payment of the ſaid rent, and of the former intaile: This Recovery ſtands well with Law and Conſcience, for that it is had for ſurety of the intaile, which the Diſſeiſee might have defeated; And if his grant had beene but by deed, being upon ſuch conſideration, it had bound the heires in taile. Octavian Lumberds caſe. 44. E. 3.

## CAP. XXVIII.

TEnant in Taile ſuffereth a Recovery to the uſe of a woman (whom he intendeth to marry) for life, and after to the uſe of the firſt Intaile, this Recovery ſtands in conſcience as the firſt Recovery; for the intent of the Statute is, that the land ſhould continually remaine in the heires in Taile, as long as the Taile indureth, and no Joynture can be

made by Recovery or Deed; but the Taile must be discontinued, and no intent can be taken against the expresse words of a Statute: And this is not like the cases of Tenant in Dower, and Tenant by the Curtesy, which shall be though the Tail be determined; for they grow most specially by the continuance of the possession in the Heires in Taile, and in those cases the intent of the Statute shall not be taken to put away such titles as the Law should give by reason of the Taile, though the words be that those to whom the Tenements be so given shall not have power to alien, &c. The words that he shall not have power, &c. are intended he nor his Heires, &c.

## Cap. XXIX.

A Man makes a Feoffment to the intent that the Feoffees shall reassure the land to him in Taile, which is done accordingly, after the Donee falleth in debt, and his body is taken in execution, whereupon for payment of his debts he sels the land by Recovery, this Recovery stands in conscience as the first; for though it may be supposed, that a man will not so much regard the wealth of his Heire, that he will forget himselfe, and though he also declare his intent so upon his Livery, the intent is contrary to the gift, and a condition or intent declared or reserved against the estate that a man makes, is void in Law: as where a man makes a feoffment upon condition,

dition, the Feoffee shall not alien; And like as in a Fee simple there is incident a power to alien, so in a State taile there is a secret intent understood in the gift that he shall not alien, then such an intent supra being void in Law is also void in Conscience. The Law that the body of a Debtor shall lie in Execution till he have satisfied the debt, standeth well with Conscience, and a Law that he may cedere bonis, viz. Make his goods, and so be discharged, were not indifferent; for so he may conceale his chief wealth from his Creditors; and though the Creditor know he have nothing wherewithall to make satisfaction, it is more convenient it should be left to the conscience of the Creditor, in whom is no default, than to the Debtors conscience; and if the Creditor know that by some casuall meanes he is fallen in decay, he is bound in Conscience, though not by the Law, to set him at liberty.

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## Cap. XXX.

AN Annuity is granted to a man and the heirs of his body, to perceive of the coffers of the Grantor, the Grantee suffers a common Recovery in a Writ of Entry by the name of a rent in D. of like summe, intending that the Annuity should be recovered: This Recovery bindeth not the Heir in Taile, in Law nor conscience; for a Writ of Entry lies not of an Annuity, therefore it cannot be intended of the Annuity:

But if it had been of a rent iſſuing out of land, it had been of like effect, as the abovesaid Recoveries of land. There be divers diverſities between a Rent and an Annuity, namely a Rent is iſſuing out of land, an Annuity chargeth onely the perſon of the Grantor and his Heirs, having Aſſets by Diſcent, or the houſe if it be granted by an houſe of religion, to perceive of their coffers. Alſo of an Annuity lieth no other action, but only a Writ of Annuity, and this againſt the grantor, his heirs and Succeſſors, but of a rent the ſame actions lie as for land, and they be brought ſometimes againſt the Ter-tenant, ſometimes againſt a Parmor, and ſometimes againſt neither; for of a rent-ſervice it is brought ſometime againſt the Meſne and the Diſſeiſor, and ſometimes againſt the Meſne alone if he did the Diſſeiſin. Alſo an Annuity is no aſſets, nor Freehold in Law, neither ſhall it be put in execution upon a Statute or Elegit, as a Rent ſhall, for it is but Choſe in action.

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## Cap. XXXI.

A Woman Tenant in Tail within the Statute of 11 H. 7. ſuffereth a recovery, and after her ſon and heir apparant releaſeth to the recoverer by fine, and dies, living his mother, having another brother, and now the mother dyeth, the brother as it ſeemeth cannot enter; for ſuch a Recovery with aſſent of the heir, to the agreement be of Record,

is

is affirmed by the Statute, and a Fine is one of the highest Records in the Law, so now he hath right both by the Recovery and the Statute, yet for that the Fine was levied after the title given of Entry, and that the assent was not at the time of the Recovery as in coming in as Mouchee, quære. (B. This assent coming after, cannot make good that void before.) But if the elder brother had died, and the second brother had released by Fine, that should not bar his Issue of his title of Entry. And note notwithstanding the Statute of 11. doth not prohibit other Recoveries but of Jointures, yet it is not to be understood to allow of recoveries of other Estates tail, no more then it doth allow of Recoveries of Joyntures suffered before the day limited by the Statute, but leaves them of the same effect as they were before, sparing both for the multitude of them, and yet not comforting any to take them after.

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## Cap. XXXII.

TEnant in Tail is disseised and dies, and an Ancestor collaterall to the Heir in tail releases with Warranty, and dies, and the Warranty discends upon the Heir in Tail, he is thereby barred in Law, and in Conscience also as it seemeth: The reason, because by

by an ancient Maxim, a collaterall Warranty bars, as well a State tail, as a Fee simple, and it is not remedied by the Statute of West. 2, An exhortation that all Estates tail should be made Fee simple, or else to make the Tail so strong, that they may not be cut off by common Recovery, Fine with Proclamation, Collateral Warranty, nor otherwise, to the scruple of many mens consciences.

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The

# The ſecond Book.

## Cap. I.

TEnant after poſſibility commits waſte, it is diſpunishable by the Law, for the authority that he had by the gift in Taile to doe waſte continueth, as long as the gift and the Livery made thereupon continue, and he may cut down trees, and doe all things as Leſſee for life without impeachment of waſte, and ſuch words without impeachment, &c. in the gift in Taile had been void, becauſe it is but that which the Law gives: and for that the ſtate continues, he ſhall not have as Tenant for life ſhall: yet if he make a Feoffment, becauſe it is to the diſinheritance of him in the reverſion it is a forfeiture, as it is of Tenant for life: Alſo the Donor ſhall be received if he make default, &c. but that is by the Statute of Weſt. 2. Alſo Tenant for life nor years were not puniſhable for waſte at the Common Law (though it were againſt conſcience

for

for them to do it) the reason, because they had their estates by grant of the party, whose folly it was he provided not against waste at the making of the Lease: But if Tenant by the Curtesie or Tenant in Dower did waste, a Prohibition of waste lay at the Common Law (where he in the reversion should recover single dammages) for their Estate being created by the Law, the Law prohibited that they should do no waste, destroying of houses, cutting down trees, and digging grave'll are waste. If Cestuy que use for life had committed waste, he was dispunishable in Law, though he offended in Conscience. And Tenant after possibility may not with good conscience, though he be dispunishable in Law, do all manner waste, as pull down houses, and make pastures of Cities and Towns: And so some have thought of Tenant in fee, that he cannot with conscience destroy his Woods and Cole-pits, whereby the whole Countrey for their money have had fuell, and yet if he do, he is not bound to make restitution to any person certain.

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## Cap. II.

This term, At the Common Law, is taken in three manners; First, as the Law of this Realm of England dissevered from all other Laws; And so it is often argued what ought to be determined by the Common Law, and what in the Admiralty or Spiritual

tual Court: Also if an Obligation bear date out of the Realm, it is said, it is not pleadable at the Common Law. Secondly, it is taken for the Kings Courts of his Bench and Common Pleas, as when a Plee is removed out of ancient Demesne, for that the Land is Frankfree, and pleadable at the Common Law, viz. in the Kings Courts, and not in ancient Demesne: So is it often pleaded in base Courts, as Court Baron, County Court, and Court of Pypowders, that it ought not to be determined there, but at the Common Law, viz. in the Kings Courts. Thirdly, At the Common Law, is as much to say, as before such a Statute made, as appeareth in the precedent Chapter.

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## Cap. III.

If a man be Outlawed in a personal action (although without notice) the property of his goods is altered, and given to the King: For by an old Custom and Maxim in the Law, he that is Outlawed shall forfeit his goods to the King. The beginning of which Maxim was upon this reason, No man shall be condemned in our Law without answer, or that he appear and will not answer, wherefore when one hath done a trespasse, &c. If this Processe had not been, and the Defendant had no lands, there had been no remedy if he would not appear upon an action brought against him, therefore it hath been used time out of minde, that if upon an Attachment directed

directed against the Defendant, returnable in either Bench, if he returned Nihil, &c. then shall goe out a Capias to take his body, and thereupon an Alias and plur', which if they be returned Non est inventus, and he appeareth not, then an Exigent shall go forth against him, which shall have so long a day of returne, that five Counties may be holden in the mean time, in every of which Counties he shall be solemnly called, and then if he appeare not, the Coroners shall give judgment of Outlawry against him: By which Outlawry he loseth his goods and divers advantages in Law for his contempt: which said Processe was well devised for the execution of Justice, &c. And if the party have given cause of action, he should take notice of the suit at his peril: If not, yet the King in Justice is bound to grant Processe upon surmise of the Plaintiffe, without other examination of the cause, than by the pleadings of the parties, and here the Defendant is put to his action of the Case against him that caused him to be outlawed upon an untrue action, but if he die before the action brought, Actio moritur cum persona: But if the party had been returned quintus exactus, where in deed he was never called, there it seemeth the party hath remedy by petition to the King, especially if he that made the returne be insufficient, or die before recompence made. For further notice to the party, it is ordained by the Statute of 6. H. 8. that a Writ of Proclamation shall goe out, if the party inhabit in a foreine County (See also now a new Statute of 29. Eliz.

Eliz.) And in divers other cases also a man may lose the property of his goods without notice; As if they be sold in Market overt. Also goods stollen and seised for the King, or waived and seised as Waife, by one that hath Waifes, are forfeited, unlesse the Owner sue an Appeale, &c. (But see the Statute of 21. H. 8. 11. that if the party give evidence upon arraignment of the Felon upon an Judictment, and the Felon is attainted, that he shall have restitution of his goods, as if he had sued an Appeale.) So if Strays that are proclaimed and not claimed within the yeare. So are Deodands, to whomsoever the property were, which shall be disposed of, &c. Also a fine with Non-claime within the yeare, was a bar to demand the lands at the Common Law, and now by the Statute of 4. H. 7 by Non-claime within five years. And the reason that a property may be so altered is, for that the Law of property is not meerly the Law of Reason nor of God, but the Law of man concurring with them, then the Law of man giving the property, may limit the gift or condition with it, and it will stand well with conscience.

## Cap. IV.

A Stranger doth waste in lands lesed for life, he in the reversion shall recover against the Tenant for life the place wasted, and treble dammage, although he were ignorant of the waste, and although the Stranger be not

sufficient

ſufficient to make him recompence, and this both in Law and Conſcience. The reaſon is, that at the Common Law, Tenant in Dower and Tenant by the Curteſy tooke the Land with this charge, That they ſhould doe no waſte, nor ſuffer none to be done, and when the Action of Waſte is after given by the Statute of Gloceſt. cap 5. againſt Tenant for life and yeares, they were ever after taken to be concerning waſte, in like caſe as Tenant by the Curteſy, &c. for after the Action given againſt them, no reaſon can be aſſigned, why they ſhould have more favour, and there is a Maxime, that of like Caſes, like Law, note the Statute being penall. And as to the inſufficiencie of the ſtranger, it is for a Common-wealth that waſte ſhould not be done, which is more favored in Law than the particular caſe of any man: Alſo it is the folly of the party to take ſuch an eſtate, and folly may prejudice the party, as if a Termor binde himſelfe in an Obligation to leave the land, &c. in as good caſe, &c. And although it may be objected, that although a woman may waive her Dower, yet Tenant by the Curteſy cannot waive his eſtate, for by Act of the Law, the eſtate continues in him after the death of his wife without Entry, and therefore folly cannot be aſſigned in him, or perraſe he was an Infant, or the land deſcended to his wife after mariage, yet there is greater reaſon that the Tenant ſhould be charged with ſuch a waſte, than he in reverſion diſherited and have no remedy, nor yet the profit of the land as the other hath: But if the Tenant for life

hath

had been bound in an Obligation, that he should do no waste, his Obligation had not been forfeited by the waste of a stranger. Also Tenant for life shall not be punished for waste done by enemies or sudden tempest; but the reason hereof is not, because he can have no recompence over, but by a reasonable Maxim in that behalf.

## Cap. V.

If a very heir be certified Bastard by the Ordinary, if after he bringeth another action against any other as heir, they may have by the Law the advantage to plead the same Certificate in bar, two reasons: One, for that by a Maxim in the Law, a mischief shall rather be suffered then an inconvenience; for perchance, if another Writ should be directed to a new Ordinary, he would certifie him Mulier, whom the other had certified Bastard in the same Court, for the avoiding of which contrariety, &c. Another cause, for that the Certificate of the Ordinary is the most high triall in this case in the Law, but then it must be understood where Bastard is alleaged in one that is party to the Writ; for if it be alleaged in a stranger, as Plee in aid, Voucher, &c. that shall be tryed by Jury, which is no conclusion to the stranger, because he is not privy to the tryal, neither may have an Attaint, but he that is parey to the issue may have an Attaint, and therefore shall be concluded: Yet it seemeth that he that hath barred

the Demandant by such a Certificate, knowing him to be very heir, cannot retain the land in conscience, though there be no Law to compell him to restore it. It is also reasoned, that a Lawyer if he knew the truth, viz. that he is not Bastard, ought not to give counsell, though it be according to the Law, to plead it, for two reasons: The one, by the Law of Reason he is bound to do as he would be done unto: The other, he thereby gives his Client a liberty, to chuse whether he will restore, and thereby puts himself to jeopardy of another mans conscience, Et qui amat periculum, in illo peribit, and although there were none other to plead it, so that by his refusing the inconvenience supra must follow; for that charity beginneth at himself, he ought rather to suffer all other offences, then himself would offend.

## Cap. VI.

A Lawyer knowing that the Defendant hath a sufficient matter to be discharged by Subpena, which he cannot plead at the Common Law (as in the case supra, Lib. 1. cap. 12. in an Action of Debt upon an Obligation, where the Defendant hath lost his acquittance) may not in conscience be of counsell with the Plaintiffe in the Action at the Common Law; And though he be sworn to give counsell according to the Law of God and of Reason, being two speciall grounds of the Law of England, as of the Law positive, and by both

both those Laws a man must do as he would be done unto; Also by the Law of Reason, Nihil possumus contra veritatem. Where by such an Action he must suppose and aver, that it is a very due Debt, and that the Defendant withholdeth it from him unlawfully: And although the Defendant may have remedy by Subpena, and it may be said that this is the way to induce him to his Subpena, this course is chargeable to the Defendant, and proofs may die.

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## CAP. VII.

BEfore 27. Cestuy que vie puts in his beasts to manure the ground, and the Feoffee distrains them dammage feasant, whereupon Cestuy que use brings an action of Trespasse against the Feoffee, which will not lie; for he had nothing in the land, but his remedy had been by Subpena in the Chancery, to cause the Feoffee to reinfeoffe him: And although after the Statute of R. 3. he might make a feoffment, yet for the profits he had no other remedy then before. In this action of Trespasse, the Lawyer may with good conscience, knowing his right, be of counsell against the Action, and be with the Plaintiffe in the Chancery without contrariety: for the supposall of the action of Trespasse was untrue in every point, as to the Common Law, and then in being of counsell he resisteth not the Plaintiffe to have the profits, but only to maintain an untrue action for them: So where one hath right

to land, as heir to his father, and will bring an action as heir to his mother: And so a man may give counsell in Dilatories, whereby the party may take hurt, if they were not pleaded, though he know the Plaintiffe have right, as misnaming the party, or town, or mistaking the degrees in a Writ of Entrie: But otherwise, if the party should take no hurt by admitting a Dilatory, as to plead in abatement of a Formedon in Descender, because the Demandant hath not made himself heir to him that was last seised, or in a Writ of Right, for that the Demandant hath omitted one that tended right, &c. And he may not with conscience, knowing the Demandant hath right, assent to the casting an Essoin, or Protection, nor vouch for the Tenant, unlesse he know he have true cause of voucher and lien, neither pray in aid for him, unlesse the Prie have good cause of voucher and lien over, or that he hath somewhat to plead, that the Tenant may not, as Villenage in the Demandant, &c. And a man with conscience may be of counsell with him, that hath land by a Discent, or by a Discontinuance without title, if he that hath right bring not his action according to the Law.

## Cap. VIII.

A Man distrains for Debt upon an Obligation or Contract, and detains the Distresse untill he be satisfied of his Debt, he is in con-

conſcience to make recompence of the ſum and dammages: for although the debt be certain, being received without dammages (and is not as if it had been for a treſpaſſe or dammages, which are arbitrable, and no man ſhall be his own Judge) yet becauſe this being a duty is received by undue means, viz. by Diſtreſſe, it cannot be intended the debt, but the party diſtrained may have a ſpecial Writ of Treſpaſſe of his beaſts taken and detained, untill a Fine made, by which he ſhall recover dammages for the taking, and alſo the ſum received, ſo that he is but a wrong doer: But it ſeemeth the Defendant is reſtored to his firſt action, as it is where a Judgement in Treſpaſſe is reverſed by error, and the dammages recovered repayed.

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## Cap. IX.

For what a man may Diſtrain. ¶ A man may diſtrain of common Right for a Rent ſervice, and all manner ſervices, as Homage, Fealty, Eſcuage, Suit, &c. alſo for a rent reſerved on a particular eſtate, if he reſerve the reverſion. ¶ If a Feoffment be made reſerving a rent, he cannot diſtrain without a clauſe of Diſtreſſe, and if the Feoffment be not by Indenture, the reſervation is void in Law. Like Law where a particular eſtate is made reſerving a rent, the remainder over in Fee. ¶ Tenant for life grants his whole eſtate reſerving a rent, it is a void reſervation, if it be not by Deed indented, and without a clauſe

of Diſtreſs it is a Rent ſeche. ¶ For an Amercement in a Leet the Lord may diſtrain, but not in a court Baron. ¶ A leaſe at Michaelmas for a year, rendring a rent at the Annunciation and Michaelmas, he may diſtrain at the Annunciation, but not at Michaelmas, becauſe the term is expired: But if it be payable at Midſummer and Chriſtmas, otherwiſe it is during the term. ¶ So if Tenant per autre vie makes a Leaſe for years, reſerving a rent, Ceſtuy que vie dyeth, he cannot diſtrain, becauſe his reverſion is determined. ¶ Ceſtuy que uſe before 27 H. 8. makes a Leaſe for years or life, reſerving a rent, it is a good reſervation, and the Leſſor ſhould diſtrain. ¶ If a Townſhip be amerced, and neighbours by aſſent aſſeſſe a certain ſum upon every inhabitant, and it is agreed, that if it be not paid by ſuch a day, that certain perſons thereto appointed ſhall diſtrain, ſuch Diſtreſſe is lawfull. ¶ Lord and Tenant by fealty and rent, the Lord grants the fealty reſerving the rent, and the Tenant attorns, the Lord cannot now diſtrain for the rent, for it is Seche: But if a man make a gift in Tail, reſerving fealty and rent, and after grants the fealty reſerving the rent and reverſion, here he ſhall diſtrain for the rent, for the fealty is incident to the reverſion, and cannot be granted. ¶ For Heriot ſervice the Lord may diſtrain, but for Heriot cuſtom he muſt ſeiſe and not diſtrain. ¶ For rent granted upon Equity of partition, or of Dower, the party may diſtrain. ¶ A man in no caſe may diſtrain in the night but for dam-

mage

mage feasant. ¶ For waste, reparations, accompt, debt, &c. a man may not distrain.

## Cap. X.

A Man commits a Trespasse and dies, his Executors are not chargeable in Law, for Actio moritur cum persona, neither upon a simple contract made by the Testator, and therefore if they make amends for this, before debts or legacies paid, it is a Devastavit: But after such things discharged, whereof they are chargeable in Law, of their charitable acts for the Testator, these ought first to be satisfied in conscience, and the debt first because it is certain, and the trespasse arbitrable: But necessary funerall expences must be allowed before all other things: And so it seemeth of the Probate, unlesse there be not sufficient besides to pay the debts and funerals, and then the Ordinary will pardon it. And it seemeth, that making Executors and their authority is by the custom of the Realm, although it be used in all countries, and not by the Law of Reason, for before the Law of property there were no wills. And in some place, by a particular Custom, the Heir shall have the goods and chattels reall and personall, which by the generall Custom go to the Executors. And after all debts and legacies paid, Executors shall have actions for debts due to the Testator, and not to their own use. If the Testator dis indebted by Obligation in several sums of £. li. the piece to two, having goods but to

the value of x. li. the Executor may pay which of them he will. (B. So if they bring their actions severally at an instant.) But if one obtain a Judgement before another, he must be first paid. Executors may favour one to confesse his action, and use lawful delays by Essoin, Imparlance, &c. to the other, so that though one commence his action first, another may first obtain a Judgement. After an action commenced, that debt must be paid before a debt upon an Obligation, except the other bring his action, and recover hanging the first action, and that without covin: Neither must they pay debts upon Obligations, whereof the day is not come, where others are already due, but when the day is incurred, that which was last due may be first paid; if no action be commenced for the first, and though an action be commenced, yet they may confesse an action brought for the debt last due, that he may have Judgement first. But in conscience the Executors should respect which debt grew upon the clerest cause, if they grew upon equall cause, then who hath most need: The said confessing the action, and delaying the other, cannot be said covin; for covin is where the action is false, and not where the Executor bears a lawful favor. The remedy for Legacies is by the Law Spiritual. The Ordinarie cannot cause Executors to accompt contrary to the order of the common Law.

## Cap. XI.

A Man indebted x li. upon a Simple Contract, by his Will doth bequeath x. li. to I. S. and dyeth, leaving goods only to bury him with, and to perform the Legacy, and the Executor delivers the goods in performance of the bequest to I. S. although the Executor were bound to pay the Legacy (for that he is not chargeable in Law with the debt upon the simple Contract) yet it seemeth I. S. is bound in conscience to pay the debt upon the simple Contract, unlesse the Legacy were given him in satisfaction of some duty: But if the debt had been due by Obligation, he to whom the Legacy was paid, had not been bound in conscience to pay that debt, for that the Executor is chargeable of his own goods for paying Legacies before debts, and there he that had the legacy is bound in conscience only to repay that he received to the Executors: But in Law in the principal case otherwise it is; for none in Law is to pay debts of the dead, but Ordinary, Executor, and Administrator, for the person was chargeable of the Testator, and Executors having goods represent his estate, and be chargeable, and not the goods; for if the Executor give the goods, the Donee is not chargeable with the debts, but the Executor of his own. So if A. be indented to B. and B. is indebted to C. and B. dieth intestate, having no other goods but that which A. oweth him,

him, C. hath no remedy till the Administration granted, and that the Administrator recovers against A. That debts shall be paid before legacies, is both by the law of Reason, and the law of God. Like conscience ut supra, where the Testator had done a Trespasse, whereupon he ought to have made restitution.

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## Cap. XII.

A Man dyeth seised of land in fee having two sons, a stranger abates, the eldest son dies without issue, the younger shall have his Mordancester, as son and heir to his father, without mentioning his brother, and shall recover the land and dammages from the death of the father by the Law, yet the elder brother might have released as well the right of the land, as of the profits, which should have been a bar to the younger. But in a Writ of Aiel, the Demandant shall recover dammages only from the death of his father: the reason, for that although the Aiel survive the father, the Demandant must of necessity convey by his father, viz. he must make himself son and heir to his father, and sonn and heir to his Grandfather. Notwithstanding the general ground, that all Chattels go to the Executors, in some cases Chattels go to the heir & not to the Executor: As is of the dammages from the death of the father to the death of the elder brother supra: So if a man sue a writ of right of Ward, of a Ward that he hath of his own fee, and die

hanging

ringing the Writ, and his heir according to the Statute of West 2. sueth a Resummons and recobers, here the Heir shall enjoy the Wardship which is a Chattel against the Executors, but that is by force of the Statute: So commonly there is no generall in the Law so sure, but sometimes fails: and in these cases the Heir is not holden in conscience to pay the Executors any part of the value of these Chattels; for as appeareth in the last Chapter, it is only by the law of man, that disposition of Chattels is given to the Executors, so that where that Law taketh them from Executors, they be rightfully taken from them. But if the younger brother had entred supra, without bringing his Mordancester, as he might, there because there is no Law that taketh the dammages from the Executors, so that the generall ground, that all Chattels go to the Executors holdeth, there the Abator is bound in conscience to make restitution of the profits supra, to the Executors, so are they supra if the Father obertibe the Fiel, in conscience to restore to the Executors of the father, the profits incurred in his time.

## Cap. XIII.

Before the Statute of Merton, cap. 1. the Demandant in Dower should recober no dammages, but by the Statute, where the husband dyeth seised, the wife shall recober dammages, which generall words of the Statute have been always construed, where the husband

husband dieth seised, and where the Tenant may not say, that he is, and always hath been ready to yeeld Dower, that the Demandant shall recover dammages from the death of the husband, viz. the profits of the third part of the land from that time, and dammages for the detaining of them: But if he appear the first day, and can say he was always ready to yeeld dammages, if it had been demanded, it is a good excuse for dammages, though the husband died seised: The reason, for that he that hath possession of land, whereunto a woman hath title of Dower, hath good authority, as against her, to take the profits till she require her Dower upon the ground, and the Tenant be not there to assigne it, or being there will not assigne it; for every woman that demandeth Dower, affirmeth the possession of the Tenant as against her, and although she recover by action, she leaveth the reversion where she found it, though it be in a Disseisor, and doth not recontinue the right, as other Tenants for life do, which is the reason the Tenant shall be received to the plea supra: Contrary in Cosinage, &c. for there the Tenants be supposed wrong doers: But where the husband alieneth and dieth, there no dammages are to be recovered by the Law, then if the woman demandeth her Dower, and the Feoffee refuseth to assigne it, and after she demandeth it again, and he assigneth it, it seemeth he is not bound in conscience to yeeld her dammages before the request, Causa qua supra: But after the request he is in conscience, though not by the Law; As it is where Tenant for life

is

is disseised and dieth, and the Disseisor dieth seised, and his heir entreth, and he in the reversion recovereth the land against the heir, though by the Law he shall recover no dammages, yet in conscience the Heir is bound to pay dammages to the Demandant.

## Cap. XIV.

A Disseisor, to extinct the right of the Disseisee, which he well knows, levieth a Fine with Proclamation, and five years incur without claim made by the Disseisee, the right of the Disseisee is bound by the Law. But it is doubted, whether being done of purpose to extinct the right that he knew was better than his own, it extinct it in conscience: But if the Disseisee know of the Fine, and wilfully suffer the five years to passe, it is the clearer.

## Cap. XV.

The husband having issue by his wife, Land descends to the wife, and before the husband can by possibility come to the land to enter, his wife dyeth, the husband shall not by the Law be Tenant by the Curtesie, for a man shall not be Tenant by the Curtesie of land, but of a possession of his wife in Fait, though a woman shal be endowed of the possession of the husband in Law: But the husband

shall

shall be Tenant by the Curtesie of a rent, a
though his wife die before the day of pay
ment: So of an Advowson, although the
before avoidance: And this by an old Cu
stom and Maxim of the Law, that serveth
these and not for the land; for if the reas
were, because of the impossibility to ha
seisin before the day of payment or avoidance
that reason should also hold here in the prin
pall case: Then the Law being ut supra, the
is no help in Conscience; for Conscience mu
be grounded alwayes upon some Law, and
is not by the Law of God nor of Reason, tha
a man shall be Tenant by the Curtesie, b
by the Custom of this Realm. Then seeing t
Custom helps him not, he cannot be holpen
conscience: So where a reversion is gran
without Attornment, or a new rent with
deed, or land, before 32 H. 8. was devised
will that was not devisable by Custom, unle
the same were upon consideration of money,
So where Tenant by priority makes a F
offment, and takes back an estate, so that
now holds by posteriority, in all these cas
seeing there is no rifle or help in Law, there
none in conscience; for conscience never
sisteth the Law of man, nor adveth unto
but where it is in it self directly against t
Law of Reason or the Law of God, and th
it is more properly called a corruption then
Law. Or where a generall ground of t
Law of man worketh in any particular case
gainst the said Lawes, as it may, it being
good Law. Or where there is no Law of ma
provided for him that hath right by the
Laws

Laws; And then sometimes remedy is given by Subpena, sometimes not, but it is left to the parties conscience.

## Cap. XVI.

A Rent charge is granted in Fee out of two acres of land, the Grantor after without consideration infeoffeth the Grantee of one of the acres to the Grantees own use, the whole rent is thereby extinct in Law; for the intire rent was going out of both acres, and not part out of one, and part out of the other, then when the Grantee purchaseth one acre whereby that is discharged, the other also must be discharged, unless it should be apportioned, and in this case the Law will suffer no apportionment by the parties own act, for this rent beginneth all by the act of the party, and is called a rent against common right, wherefore it is not favoured in Law, as a Rent serbice is, but if part of the land descend, there shall be an apportionment, because he hath the land there by act of the Law, and no folly can be assigned in the party. But in conscience it seemeth the whole rent doth remain supra, if the Feoffment were upon trust, for no reason that acre whereof he is infeoffed, of which he is to take no profit, should be discharged also the rent, and so for the other acre in the Grantors hand, because he was in as great fault to make the Feoffment, as the other to take it. Also if the Feoffment were

were made upon a bargain, or contract, if in their bargain they remembred the rent, conscience must follow the bargain, if not, it is to continue in conscience after the portion, but in the principall case, it is extinct in conscience, as it is in the Law: Fee grants or profits out of land, have not their effect by the Law of Reason, more then grants of land it self, but by the Law of the Realm, if they had, they might as well passe by word, as by deed; but the grant of a rent, if it be not in deed is void in Law, then may the Law of the Realm determine how long such Rents shall continue, and when the Law judgeth such Rents void, so doth conscience, except the judgement of the Law be against the Law of God, or the Law of Reason, as it is not in this case: But if he be ignorant that it hath such a rent, which is ignorantia facti, or if it be ignorant that the Law would extinct the whole rent, which is ignorantia juris, although such ignorance help little in the Law of England, it seemeth the rent doth remain in conscience after the portion, because in conscience no default can there be assigned in him.

## Cap. XVII.

A Man granteth a Rent charge out of two acres, and after infeoffeth H. of one of the acres, after H. intending to extinct all the Rent, causeth his acre to be recovered against him by a Writ of Entry in the Post, in the name

name of the Grantee and others to his own use, the Grantee not knowing of it, the other Demandants enter by force of the recovery, and die, so that the Grantee is seised of all the acre by the Survivor to the use of H. the whole rent is extinct in Law; for the whole rent cannot be issuing out of the acre in the Grantors hand, this recovery being upon a fained title, which the Grantor being a stranger unto may falsifie: but if the recovery had been upon a true title, the whole rent should have been issuing out of the other acre. (B.) Quære, being his own act, for 3. E. 3. where a woman having a rent out of three acres, recovered one in Dower, the rent was apportioned. But here the whole rent by the unity of possession, although without the use, is determined against the Grantor: So in conscience the Grantor not being privy to the cause of the extinguishment, as in the case before, and the Grantee is in conscience to have the whole rent of H. In this Chapter and the last, where it is said, the rent is extinguished in Law, it is understood that the remedies at the Common Law by Distresse, Assise, &c. are determined, and the party that ought to have the rent in conscience, shall be put to his Subpena.

## Cap. XVIII.

A Villeine is granted to a man for life, or years, and purchaseth lands in fee, the Lessee entereth, he shall hold the lands to him and

his heirs: But if the Signiorie be granted for life, and the Tenant attorne, and die without heir, and the Tenant for life entreth, he hath no other estate there in the land, than he had in the Seignorie, for in this case of Escheat, the land cometh in lieu of the Signiorie, and the Seignorie is clerely extinct, but in the principal case, he hath not the land in lieu of the Villeine; for he hath the Villeine as before, but he hath the land as a Perquisite by means of the Villeine, which he shall have in like case, as the Villeine had them, viz. of his goods and chattels the whole property: of his leases for years, the whole term: of an estate for life, the same estate; and of Fee simple and Estate tail, the Lord shall have a Fee simple, though he had but an Estate for years in the Villeine, so that he enter or seise according to the Law, before the Villeine alien, or else he shall have nothing. And if an Executor have a Villeine, that his Testator had for term of years, and he purchaseth lands in fee, and the Executor entereth, he hath a Fee simple in the land, but it is to the behoof of the Testator, and shall be an Assets in his hands. (B.) Like Law of a Bishop, Parson, &c. which have a Villeine in right of their Church, which purchaseth land and they enter, they are seised in right of the Church, and not as a Perquisite. Note the diversity, for a Lessee, &c. hath the Villeine in his own right for the time, &c. And the Lord may imprison the body of his Villeine if he will. And admitting the Law, that a man may so take away the lands and goods

of

of his Villeine, and imprison him, to stand with conscience, (because it hath been so long admitted in the Laws of the Realm, and hath been put in ure both by Spirituality and Temporality) the Law that determineth what estate the Lord shall have ut supra by his entry, is neither against the Law of Reason, nor the Law of God; and therefore conscience must follow the Law of the Realm therein.

## CAP. XIX.

IF a man mistake the Law, as if in the case in the last chapter, he give counsel to him in the reversion, after the death of the Villeine, that he may enter, and that the Tenant for life by his entrie had but an estate for life of the Villeine, whereupon he entreth, to the great expences of both parties in suits, the Counsellor if he knew the Law, is bound in Conscience to restitution to both parties, of that they are indammaged, as also to make amends for his untruth: So if he took upon him to know the Law, and had taken no competent study therein, he is bound to restitution to both parties: But if he that hath taken sufficient study, do mistake the Law in some hard point, he is not bound to such restitution. If he ask the counsel of one that he knoweth is not learned, the Client or Counsellor (if the Client be not sufficient) because he gave counsel to the wrong, be bound to restitution to him against whom, &c. but

the Counsellor in that case is bound to nothing as to him that he gave the counsell unto; for there was as much default in him to ask counsel of one whom he knew ignorant, as in the other for his presumption to give counsel being ignorant: But if he that gave the counsel knew not but that the other had trust, both that he could & would give him good counsel, howbeit the truth was that he could not so do, then is he bound to offer amends, but the other may not take it in conscience. An admonition to Counsellors to be warp in giving advice, and not to think it a rebuke unto them, to withdraw that they have misdone, but to follow the saying; That we have unadvisedly done, let us with good advice revoke again. If a man give counsel in this Realm, as his learning and conscience giveth him, and regardeth not the Laws of the Realm, he giveth not good counsel, for every man is bound to follow the Law of the Countrey where he is, if it be not against the Law of God, nor the Law of Reason, and so may the cases be, that he may binde himself to restitution by such counsel.

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## Cap. XX.

A Man of his meer motion infeoffeth H. by Indenture upon Condition, that he shall yearly pay to I. S. out of the land a certain rent, and if he fail, that it shall be lawfull to the said I. S. to enter, &c. the rent is unpaid, I.S. may not enter by the Law, nor Conscience;

ſcience; for there is an ancient Maxim, that no man ſhall take advantage of a Condition, unleſſe he be party or privy to the Condition: And as to the intent it is void in many caſes to all intents, not being grounded according to the Law: As if a man make a leaſe for life, and after confirmeth the eſtate of the Tenant for life, the remainder over to A. B. in fee, it is a void remainder, notwithſtanding the intent; for by the Law, no remainder can depend upon any eſtate, but the eſtate begin at the ſame time when the remainder doth, where in this caſe, the confirmation inlarged not his eſtate, nor gave him any new eſtate: But if the leaſe had been per auter vie, and the Lessor had confirmed the eſtate of the Leſſee, for the life of the Leſſee the remainder over, it had been a good remainder, for there the eſtate is inlarged. (B) Note although there be no words of grant. And in the firſt caſe, it cannot inure to A. B. by way of grant of a reverſion, for that is no party to the deed; And no grant can be made but to him that is party to the deed, except by way of remainder: Therefore if a man grant to a ſtranger, that his Leſſee for life ſhall have eſtate to him and his heirs, it is a void grant, if it be of his meer motion. So if a man make a leaſe for life, and after grant the reverſion for life, the remainder over in fee, and the Tenant for life attornes to the Grantee for life, intending that he only ſhall have advantage by his attornment, his intent is void, and it inureth according to the grant, but the Feoffer may enter ſupra for the condition broken

for the words upon Condition, imply a re-entry to the Feoffor, then the words subsequent that the stranger should enter, are but nugation and void in Law.

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## Cap. XXI.

If the words in the last case had not been conditional, but by these words, It is agreed, that the Feoffee shall pay to H. and his heirs the said rent, and if he fail, it is agreed that H. and his heirs shall enter into the land, then for nonpayment neither the Feoffor nor the said H. should never enter into the land; for here is no re-entrie given to the Feoffor, as in the case precedent, and the entrie given to H. is void in Law, because he is a stranger to the deed, therefore here it is to see to what Use the Feoffment shall be taken, and it seemeth it shall be to the use of the Feoffee, as long as he payeth the rent, for no reason he should be troubled with payment of the rent, and have nothing for his labour, neither can the intent of the Feoffor be taken so, except he expressed it also by the words, That if the rent were not paid that H. should enter, it appears that he meant not to have any use himself: So this varies from the common case of uses, where a man makes a Feoffment, and it appears not to what use, nor it is not upon any recompence, it shall be taken to the use of the Feoffor, except the contrary can be proved by some bargain, or that his intent was expressed to some other use at the time of the livery: So the know-

ledge

ledge of the intent of the Feoffor is the greatest certainty for knowledge of the use in this case; but when the Feoffor saith, That if the rent be not paid, that then the said H. should enter, though by the Law he cannot enter and have Freehold, yet the intent of the Feoffor appears thereby, that he should have the use; for seeing he had the rent to his own use and not of the Feoffor, it seemeth he shall have the use of the land that is assigned to him for nonpayment of the rent, and it must be understood that he had the rent to his own use, and it shall not be understood to any other use, unless it can be proved, for it is no rent in Law, and though it were assigned to him and his heirs without Condition, he hath no remedy for it by Distresse, Assise, Writ of Annuity, &c. But his remedy is in Chancery, where he must suggest that he ought to have it in conscience, and hath no remedy at the Common Law. And if he have no remedy but by way of Conscience, it seemeth when he hath recovered it, he ought to have in conscience, and that to his own use, unless the contrary can be proved, and if the intent of the Feoffor were that he should dispose it for him, as he should appoint, then hath he the rent in use to another use, which is seldom seen, and shall not be intended till it be proved. And so in Conscience, for Conscience searcheth that which the Law doth, viz. the intent of the Feoffor. See cap. 13. the reason of the diversity that in this Chapter the intent of the Feoffor is so much regarded, and not in the last.

## Cap. XXII.

USes of land first began and were reserved by a secondary conclusion of the Law of Reason thus, when the general Custom of property came in, it followed of reason that a mans lands and goods ought not to be taken from him but by his assent, or by the Law; And then sith he that hath lands, hath thereby two things, one the Possession, called in our Law the Freehold; the other Authority, thereby to take the profits, he that hath land and maketh a Feoffment, intending to give only the Freehold, and keep the profits, ought in reason and conscience to have the profits, and then the Feoffee is said seised to the use of the Feoffor. And although a man make a Feoffment, reserving the profits or any part thereof, as Common, Wood, Grasse, &c. it is a void reservation in Law, for it is parcel of the thing granted (and is not like the case as where a man leaseth his Manor, except xii. acre, for there xii. acre was never leased,) yet it doth not prohibit such reservation, so he that makes such reservation offendeth no Law thereby, and therefore the reservation in conscience is good, contrary if such reservation or uses were prohibited by Statute, and the Statute were not against reason, but it should prevent the Law of reason, in putting away the consideration whereupon the Law of Reason was grounded before the Statute. And the reason why the uses

use remained to the Feoffee, notwithstanding his own Feoffment, Fine, and also Recovery sometimes, is the cause and intent of the gift. A motion that it is inconvenient that matters of Record should so lightly be avoided by a secret intent and use of the parties, and by a nude and averment and matter in fait. The causes why there have so many persons been put in estate of lands to the use of others are many: Some are put away by divers Statutes, and some remain; Some have put their land secretly in Feoffment, to the intent that he that hath right should not know against whom to bring his action, which is somewhat remedied by Statutes that give actions against Persons. Sometimes to have bearing of their Feoffees; To put away such maintenance, treble dammages is given by Statute against such Feoffors. Sometimes to the use of Mortmain, when they could not give the Freehold, which is taken away by the Statute of R. 2. Sometime to defraud the Lords of Wards, Reliefs, Heriots, Lands of their Villeines, which are put away by Statutes made tempore H. 7. Sometimes to avoid Executions upon Statutes and Recognisances, remedied by Statute 19. H. 7. And they yet remain for divers causes: As to put away Tenancy by the Curtesie, and titles of Dower: And because, if they were out of the hands of the Conusor, at the time of the Extention sued, they shall not be had in Execution upon Statute or Recognisance, nor upon a Extendi facias ad valentiam: And

Cestuy

Ceſtuy que uſe may declare his will thereon: Sometimes for ſeverity of Covenants in Indentures of marriage and other bargains, which two laſt are the principal cauſes why ſo much land is put in uſe. Alſo a uſe is no Aſſets in a Formedon, nor in an Action of debt againſt the Heir, neither ſhall be taken in execution upon an Elegit. A uſe may be limited to a ſtranger upon a Feoffment, as alſo to the Feoffee himſelf, without conſideration: And Ceſtuy que uſe without conſideration may grant, that thenceforth the Feoffee ſhal be ſeiſed to his own uſe; for a uſe in eſſe may as well be granted without conſideration as the land might: But a man cannot commence an uſe but by livery, or upon a conſideration, or bargain: for if a man ſeiſed of Land grant without conſideration, that thenceforth he will ſtand ſeiſed to the uſe of the Grantee, it is void.

## Cap. XXIII.

The Diverſity between the two caſes in the xx. and xxj Chapters is this: In the firſt caſe the Feoffor might enter for nonpayment of the rent, then by his entrie he avoided the firſt Liverie, and was ſeiſed of like eſtate as before the Feoffment; ſo here remained nothing whereupon the ſtranger might ground his uſe, but only the bare grant or intent of the Feoffor, and a nude grant of him that is ſeiſed of lands is not ſufficient to begin an Uſe upon, although an Uſe in eſſe may be granted away without recompence, as the land might, if it had

had been in poſſeſſion: but it is a ground that an Uſe cannot be begun but by a Livery, or upon a recompence or bargain, and that there is ſuch a ground appeareth thus: If a man make a deed of Feoffment, and deliver it as his Deed, the Feoffee hath no title before Livery, but only may enter and occupy at the will of the Feoffor, and there is no book that the Feoffor is in this caſe ſeiſed to the uſe of the Feoffee. So if a man make a Deed of Feoffment of two acres lying in ſeveral Shires and livery in one, &c. yet it appeareth by the words of the Deed, that the Feoffor gave the lands to the Feoffee, but yet for lack of livery the gift was void, ſo is it here unleſſe Livery be made accordingly. But in the ſecond caſe the Feoffor may not re-enter, ſo the livery is on foot, and thereupon the firſt uſe may well begin in the ſtranger, when the rent is not paid unto him according to the firſt agreement. The Law of reaſon that a man may do nothing againſt the truth is not broken, if ſuch a nude grant ſtand ſeiſed, &c. ut ſupra be holden void: for it is not againſt the Grantors truth, though he be not ſeiſed to the Grantees uſe, but it proveth that he hath granted that the Law will not warrant, and therefore the grant is void. But if the Grantor had gone farther, that he would ſuffer the Grantee to take the profits or that he would execute eſtate unto him when he ſhould be required, there he were bound in conſcience by the ſaid rule of the Law of Reaſon, though by the Law it is, Nudum pactum ex quo non oritur Actio.

CAP.

## Cap. XXIV.

Contracts are grounded on the Custom of the Realm, and by Jus Gentium, and not directly by the Law of Reason; for until property was brought in, there was no Contracts: but then they were necessary, that a man might lawfully have of his neighbour that he had not of his own. Contracts therefore are made by assent of the parties by agreement between them of goods and lands for money or other recompence, but of money usual, for money usual is no contract. A Concord is properly an agreement between the parties with divers articles arising on the one side and on the other: As if A. let a chamber to B. and it is farther agreed between them, that B. shall board with A. and B. to pay for his chamber and board x. li. this is properly a Concord, but it is also a Contract, and an Action lyeth upon it: But the diversity between a Contract, Concord, Promise, Gift, Lone, Pledge, Bargain, Covenant, &c. is not much argued in our Laws, the intent whereof is to have the matter, and not the terms argued. A Nude Contract, is where a man bargaineth his goods or lands without recompence appointed; As if I say, I sell thee all my lands or goods, and nothing is assigned to be given for it, and this is void in Law and Conscience. A Nude Promise is, where I promise one such a sum, or to build him an house, or to do him such service,

and

and nothing is assigned for it, no action lieth though they be not performed. So if I promise to keep anothers goods safe till such a time, and after I refuse to receive them, and and they be lost or impaired by my negligent keeping, an Action lieth. If a man have a charge by reason of a promise made unto him, and hath performed the charge, he may have an Action for the thing promised; As if one say unto him, heal such a poor man; or make that high-way, and I will give thee x. li. if he do it, an Action lieth. So where the thing is spiritual, as marry my daughter, and I will give thee x.li. and he doth it, an Action lieth, for he hath Quid pro quo, viz. the preferment of his daughter for the money. But if they to whom, &c. have no charge by reason of the promise; as if one promise mony to an University, City, Church, Clergy, poor men, &c. though it be for the Common-wealth, or service of God, there no action lyeth. But if he intended to be bound, so it be honest, lawful, and possible, and if he doth it not, he is a liar, which is prohibited both by the Law of God and of Reason, but because his intent is secret in his heart, the Law of man cannot judge it, if he intend not, he offended only for his dissimulation, yet by mean accidents he may be discharged. If I promise one xx. li. because he hath built me an house or lent me such a sum, &c. although no Action lie by the Law, because it is upon a consideration executed, yet there I am bound in conscience to perform it after mine intent, as aforesaid. If I promise one x. li. in recompence of such a trespasse,

treſpaſſe, no Action lyeth, the reaſon for that promiſes be no perfect Contracts. For a Contract is properly where a man for his money ſhall have by aſſent of the other party, goods or other profit at the time of the Contract or after: but if it be promiſed for a cauſe paſt by way of recompence, it is rather an Accord which muſt be executed in hand; for upon an Accord lyeth no Action, and here he may be his own Judge in conſcience: for though a man ought to perform in conſcience ſuch promiſe as he was in conſcience bound to before the promiſe, though he intended not to be bound by his promiſe, as if he promiſe his father a gown to keep him from cold, &c. and here he was bound to make ſatisfaction for the treſpaſſe before, yet becauſe treſpaſſe is uncertain, and the party is ſtill at liberty to have his Action, he is not bound, otherwiſe is it if it were of a debt. In the caſes ſupra of promiſe for a Common-wealth or ſervice of God, it is ſaid an Action lieth in the Canon Law, but in this Realm if the promiſe be a temporal thing, if an Action be brought thereof in the Spiritual Court, a Prohibition or Præmunire lyeth, though no Action ut ſupra lie thereof in the Kings Court; So if debt be brought againſt Executors thereupon a ſimple Contract, or for perjury in a wager of Law, though no remedy lie for the perjury in the Kings Court; for a Prohibition lieth where the Spiritual Court holdeth plee in caſe where by the Kings Prerogative and Cuſtom they ought not, and not only where the party may have his remedy in the Kings Court.

Cap.

## Cap. XXV.

A Man having two ſons, one before, the other after eſpouſals, deviſeth to his ſon and heir all his goods, where in the Spiritual Law, he that is born before eſpouſals is Mulier, in our Law he is Baſtard, and for a legacy of goods the ſuit muſt be in the Spiritual Court, but if it had been of Chattels reals; as of a leaſe for years, or a Ward, &c. it ſhould have been in the Kings Court, the queſtion which ſhall be taken for heir ſupra, and it is holden that the diverſity of the Courts ſhall not make any diverſity of Judgement, for then might follow this inconvenience, that if the bequeſt had been both of Chattels reals and perſonals, one ſhould be judged heir in one Court, and the other in the other, which cannot be intended the fathers meaning; therefore he ſhall be judged as heir, which is heir by the Common Law, viz. he born after eſpouſals, and the Judges Spiritual are here bound in conſcience to take notice of the Common Law as in the caſe ſupra fol. 2. Where two Joynants be of goods, and one deviſeth his part, and the party ſueth for his Legacy in the Spiritual Court. And as where Executors of a man outlawed, are ſued for perfoming of a Legacy, and plead the Outlawrie in the Spiritual Court in diſcharge, becauſe they be chargeable to the King, and yet there is no ſuch Law of Outlawrie in the Spiritual Law. So muſt

the

the Kings Judges doe when matter cometh before them that ought to be judged after the Spiritual Law. ¶ If a Parson alien a portion of Dismes according as the Spiritual Law hath ordained without solemnities of the temporal Law, if it be under the value of the iiij. part of the Church, Quære whether it be good, but if it be to the value of the iiij. part or above, it is not good., therefore was the Writ of Right of Dismes ordained. And if in a Writ of Right of Dismes, it be adjudged in the Kings Court for the Patron of the Successor of him that alieneth for want of the solemnities of the Common Law, the Judges spiritual are bound to give their judgement according to the Judgement given in the Kings Court. Likewise if a Parson agree to take a pension for the tithe of a Mill, if the pension be to the fourth part of the value of the Church or above, it must be alienen after the solemnities of the Kings Laws, as Lands and Tenements must, else a Writ of right of Dismes lieth, &c. And although the Statute of West. 2. cap. 25. which giveth the Patron a Writ of right of Dismes, where the Incumbent had good right by the Spiritual Law, and was let by an Indicavit, where at the Common Law it lay only where the Incumbent had no remedy by the Spiritual Law, although this Statute speak only of Dismes, yet for that it lay of offerings and pensions in case where it lay at the Common Law, aswell as of Dismes, it is taken, that by the equity of the Statute, it now so lieth also; (And some say, it lay

lay of leſſe than the fourth part at the Common Law, vide Fitzh. Nat. Br. fol. 36. E.) The reaſon why a Writ of right of Diſmes in the caſe ſupra, lay at the Common Law for the Patron, was for that by the Spiritual Law, the alienation of the Parſon with the aſſent of Biſhop and Chapter, bars the ſucceſſor without the aſſent of the Patron; wherefore the Patron had his remedy at the Common Law, where ſuch alienation without his aſſent is not good. Farther where the Spiritual Court may hold plea of a temporal thing, they muſt judge after the temporal Law. But if it were in queſtion whether the eldeſt ſon ſupra may be a Prieſt, becauſe in the temporal Law he is a Baſtard, that ſhould be judged after the Spiritual Law; for the matter is Spiritual, but the goods ſupra temporal.

## Cap. XXVIV.

AN Abbot by our Law had the whole diſpoſition of the lands and goods of the Abbey, without the Covent, for they were dead perſons in Law, and the Abbot ſole ſhould ſue and be ſued, doe homage, fealty, attorn, make leaſes, and preſent to Advowſons in his own name, without the Covent. And the Decretal, that an Abbot might not preſent without the Covent, held not in this Realm, becauſe the makers did exceed their authority, to take the ſaid power from him here, therefore neither was it to be holden in conſcience. Againſt the uſurped authority of the Pope, under the

colour of Vicar general, to present to all Benefices with cure, our Law was alwayes, that the Patron might present in his own right: But the Patron must present him to the Bishop, who must examine his ability: If he finde him not able to take cure of souls, he is to refuse him, and the Patron to present an able person, who must be admitted, instituted and inducted by the Bishop: and this claim stands with reason and conscience. The deprivation from a Benefice belongeth to the spiritual Jurisdiction: but the right of presentment to a Church is a temporal inheritance, and shall descend as Lands and Tenements shall. And is an Assets. And for the triall of the right of Patronages, there are Actions in our Law, viz. Droit d' advowson, Assise de darrein presentment, Quare impedit, &c. and they have been alwayes pleadable in the Kings Courts, which is to be observed in conscience. Able, or vient able, shall be tryed by the Ordinarie, unlesse he be party, and then by the Metropolitan. If an Abbot in his presentment had named the Covent, it was but Surplusage, and made not the presentment void, and if he were disturbed, he might bring his Action in his own name.

## Cap. XXVII.

If a man finde beasts in his ground Dammage feasant, he may take them as a Distresse, and put them in Pound overt, (so it be within the Shire) there to remain till the owner make amends

amends for the hurt. A Pound overt is not only a common Pound, but every place where the owner of the Diſtreſſe may come lawfully, not being a Treſpaſſor, and give them meat: If in ſuch a Pound overt they die for lack of meat, it is at the peril of the owner, ſo that he that diſtraineth them is at his liberty to take his Action for the Treſpaſſe: but if it be not a Pound overt, or that they be driven out of the Shire, and die, there it is at the peril of him that diſtraineth. The owner of the cattel, after he hath rendred amends, may not take his cattel out of the Pound; for he may not be his own Judge; if he do, a Parco fracto lieth againſt him: but his way is to ſue a Replevin to have them out, and thereupon the ſufficiency of the amends offered is iſſuable, if it were not ſufficient, the Avowant ſhall have ſuch amends as the Jewrie ſhall aſſeſſe, if it were ſufficient, he ſhall yeeld Dammages in the Replevin, becauſe the iſſue is tryed againſt him: If after ſufficient amends offered, they die in ſuch Pound overt, yet is it at the peril of the owner, for he is bound at his peril, by reaſon of the wrong done at the beginning, to ſee that they have meat ſo long as they ſhall be in Pound, unleſſe the Kings Writ come to deliver them, and if he that diſtrained reſiſteth that, then if they die for lack of meat, it is at the peril of him that diſtrained, and the owner ſhall recover dammages againſt him in an Action upon the Statute, for diſobeying the Kings Writ.

## Cap. XXVIII.

BY the Civil Law, a man before the age of xxv. years cannot give, unless it be with authority of his Tutor: But in our Law, the age to give or sell lands and goods is xxj. years, which must be observed also in conscience: But before that age it is not good (by whose assent soever it be) except for his meat and drink, and necessary apparel, or as Executor in performance of the will of his Testator, &c. If a decree were made by the Church, that if one bequeath goods, to be delivered to the party at his full age, that in that case xxv. years shall be taken for his full age, this Decree bindeth not; for though the Probate and execution of Testaments, made of goods and chattels belong to the Church, except in certain Lordships that have the Probate by Prescription, yet it belongeth to the King and his Laws, to determine what shall be the lawful age of the party to have the goods, and the spiritual Judges ought to judge the full age after the Law of the Realm, seeing the matter of the age concerneth temporal goods: And the King by authority of Parliament might ordain, that all Wills should be void, a fortiore, he may appoint at what age Wills shall be performed: And he might take away the power of the Ordinary to call Executors to accompt, which proves, that the Common Law may ordain the time of the full age, as well in wills of temporal things, as otherwise,

wise, and also that Wills shall be made, à fortiore, it belongeth to the Kings Law to interpret Wills concerning temporal things, aswell when they come in argument before spiritual Judges, as before temporal, and that they ought not to be judged by several Laws.

## CAP. XXIX.

BY the Civil Law an Heretick cannot make Executors, for his goods be forfeited: But in our Law, if a man were convict of Heresie, and abjured, he forfeited no goods: But if he were convict, and delibered to Lay hands, he forfeited all his goods that he had at the time of delivery to them, but not his lands except he were executed, and then they were forfeited as in case of Felony, to the Lords of the Fee, except they were holden of the Ordinary, for then the King shall have the forfeiture by a Statute of 2. H. 4. See the Statutes 5. R. 2. ca. 5. 2. H. 4. cap. 15 3. H. 5. cap. 7. 25. H. 8. cap. 14. 31. H. 8. cap. 14. 34. H. 8. c. 2. 35. H. 8. cap. 5. 1. & 2. P. & M. cap. 6. & 1. E. 6. cap. 12. 1. Eliz. cap. 1. If the Church should decree, that for Heresie the party shall forfeit his goods, it bindeth not in Law nor conscience; for though it belong to the Church to determine Heresies, yet goods be temporal, and belong to the Judgement of the Kings Court, and until the Statute of H. 4. the Ordinarie might set no fine upon an Heretick, and by that Statute he might, and the King should have the fine, as by the Statute appeareth.

## CAP. XXX.

IF Joyntenants or tenants in common of a Patronage vary in their Presentation, the Ordinary is not bound to admit the Clerk of the more part, nor lesse, but if the six moneths passe before they agree, he may present by Laps: but if he present within the six moneths, they may agree and bring a Quare impedit against him, and remove his Clerk, and so the Ordinary shall be a Disturber. But if a Patronage descend to Coparceners, the Ordinary is bound to receive the Clerk of the eldest; for the eldest shal have that presentment, and the second next, and so forth, which is called a presentment by turn, which holdeth alway between Coparceners, unlesse they make some special composition to present otherwise. But if the King after the death of their common Ancestor, have the youngest in ward, then the King by his prerogative shall have the first presentment, and the eldest sister the next, and so by turn: And if the eldest sister present with another sister, and the other sisters then vary in presentment, every one in their own name, or together, the Ordinary is bound here to receive neither, but may suffer the Church to run in Laps, and in this case the Church is not properly said litigious, so that the Ordinary shall be bound at his peril, to direct a Writ to enquire De Jure patronatus, for that lieth where two present by several titles. And these manner of presentments are also to be observed in this Realm in conscience.

CAP.

## Cap. XXXI.

IN the Civil Law, the Patron if he be a Lay man hath but four moneths to present, but in our Law, whether he be Lay or a Clerk, he hath six months, which six moneths are to be reckoned after the manner of the avoidance; for if the avoidance be by death, creation, or resignation, the six moneths begin presently without other notice, than that the Patron must take at his peril: but if it be by resignation or deprivation, the six moneths begin not till notice given to the Patron by the Bishop himself; for it is not sufficient, though the Patron have notice by a stranger (B. or by another Bishop:) An union is also a cause of avoidance, but for that an union cannot be made without knowledge of the Patrons, who are to present joyntly, or by turn, as the agreement is upon the union, therefore with the Patron is privie to the avoidance, the six months there shall be accompted from the agreement. So note, that ignorance sometimes excuseth in the Law, as in those cases supra, where it excuseth the Patron. He sheweth that it is convenient that all men within the Realm, both spiritual and temporal, be ordered by one Law as to temporal things, and defendeth the Statutes of Mortmain, and the Common Law, which determineth of gifts and bequests to the Church, not leaving it to the Law Canon, as Doctors would have it.

## Cap. XXXII.

Diverſities of the Civil Law, where one excommenged may be aſſoiled without ſatisfaction, &c. In our Law if one be excommenged for debt, treſpaſſe, &c. (which belongeth to the Kings Crown and Dignity) it is not only an offence to the party to be called to anſwer in the Spiritual Court, in matters belonging to the Laws of the Realm (whereupon he may have a Premunire againſt the Plaintiffe and the Judge) but alſo againſt the King, who by reaſon of ſuch ſuits, may loſe great advantages by writs originals and judicials, fines, amerciaments, &c. therefore there he ought to be aſſoiled without ſatisfaction. So where by divers Statutes, if a man lay violent hands upon a Clerk, and beat him, for the beating amends ſhall be made in the Kings Courts, and for the laying of violent hands, in Court Chriſtian; If the Judge in Court Chriſtian award dammages for the beating, he doth againſt the Statute, &c. But if one be excommenged for a thing, where the Spiritual Court may award the party to make ſatisfaction, as for not incloſing the Churchyard, or not apparelling the Church convenientlie, the party muſt make reſtitution, or lay a ſufficient caution, if he be able, ere he be aſſoiled: But if he offer amends, and have his abſolution, and the Judge will not make him letters of abſolution, if the excommengement be of record in the Kings Court,

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the King may write to the Judge, him commanding thereto upon pain of a contempt: If it be not of record, there the party may have his action against the Judge: But if he be not assoiled, or not able to make satisfaction, and therefore the Judge will not assoil him, it seemeth the party may aswell have his action in that case, for not assoiling him, as where he is assoiled, and the Judge will not make him letters of absolution, Quære. Like Law where the party is accursed for a thing that the Judge had no power to accurse him in, as in the cases of debt, trespasse, &c. and though the party may have a Premunire there, yet the Judge and party may die: also though they be condemned in Premunire, that avoideth not the excommengement, therefore the action lyeth, and specially where the party is delayed thereby of actions in the Kings Court.

## CAP. XXXIII.

IN the Civil Law, there are divers opinions whether a Prelate may refuse a legacy. In our Law, a Prelate or Soveraign that may sue and be sued in his own name only, as Abbots, Priors, &c. may refuse a legacy made to the house, for a legacy is not perfect till he to whom it is made, assent to take it, otherwise in some case he might have great losse: But if he will refuse, he must assoon as his title falleth renounce to take the profits, otherwise he shall not refuse the legacy after, and yet if his successor refuse the profits, he

may save the house from dammages, and from arrerages of rents. Like Law of a remainder as of a legacy: For though it be generally holden, that in case of devise and remainder, the freehold is cast upon the party by the Law when they fall, yet may the party refuse to take them, as he may do a gift of lands or goods: For if a gift be made to a man that refuseth to take it, the gift is void. If it be made to one absent, it taketh not effect in him till he assent. No more if a Disseisin be done to the use of another, he to whose use, hath nothing, neither is a Disseisor till agreement. But a Bishop sole may not disagree to a devise or remainder made to him and the Dean and Chapter, nor the Dean sole, if it be made to a Dean and Chapter, nor a Master of a College, if it be made to him and his brethren, for of such lands they cannot answer sole; And they cannot disclaim sole in the lands which they have by such devise or remainder: Therefore if a Bishop be vouched, and the lien is alleaged by the Tenant, by reason of a lease made to him by the Bishop, Dean and Chapter, rendring a rent, the Bishop cannot disclaim in the reversion, without assent of the Dean and Chapter. But a Dean sole may refuse a grant of lands or goods, or of a reversion, made to the Dean and Chapter; The diversity, because a devise and remainder are cast upon the parties without assent, whereunto the Dean nor the Chapter sole may disagree without assent of other, but a gift or grant is not good unto them, until they both agree. To such gifts an In-

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fant may disagree aswell as one of full age But if a woman covert disagree, if the husband agree, the gift is good: but if the land be charged with dammages or more rent than it is worth, the wife shall be discharged thereof, if after her husbands death she refuse the occupation of the land: As it is where a lease for years is made to the husband and wife, yeelding a greater rent than the land is worth: And so of a successor of an Abbot: but if the husband in the last case overlive the wife and die, his Executors if they have Assets to pay the rent to the end of the term, they may not refuse the lease, but if they have not Assets, they may waive the occupation, and by special pleading discharge themselves of the rents and leases, otherwise they may charge themselves of their own goods: A lease for life, remainder to an Abbot for life of A. reserving more rent than the land is worth, Tenant for life dyeth, the Abbot may refuse the remainder; Causa qua supra; And though he assent, if after he die, or be disposed living A. his Successor may discharge himself by refusing the occupation. And if such a remainder be made to a Dean and Chapter, and the Dean agree without assent of the Chapter, the Dean and Chapter may after disagree; for the act of the Dean without the Chapter, shall not charge the Chapter in that behalf. If in a Præcipe there be but one Tenant, whether he be spiritual or temporal, if he disclaim in case where disclaimer lieth, the land shall rest in the Demandant; but if there be two Tenants, it

shall

shall vest in his fellow, if he will take the whole Tenacy upon him, if he will not, then in the Demandant. But if an Abbot or Layman refuse the taking the profits, and shew a speciall cause why it should hurt him if he did assent, and be thereby discharged ut supra, Quære in whom the lands shall vest. In these causes supra, conscience followeth the Law.

## Cap. XXXIV.

By the Civil Law, a gift made under a form shall not be avoided, if the Soveraign only breake the condition; for the Deed of the Prelate only ought not to hurt the house. But if in our Law a man infeoffe an Abbot by Indenture, upon condition of payment of a certain sum, &c. if the Abbot fail in payment, the Feoffor may re-enter, for the Abbot hath no right, but by the gift of the Feoffor, which was conditional, and that being broken, the Feoffor may re-enter, by which re-entrie he overthroweth the first livery, and all mean Acts, and holdeth the land as in his first estate, and our Law regardeth not in whom the default be that the condition is broken, except the Feoffor himself be Particeps criminis. But there is a great diversity, where the gift is absolute, for there the Abbot alone shall not by the Common Law disherit his house, except in few cases, but upon divers Statutes the the sufferance of the Abbot only might disherit the house, viz. by his cessler, by levying a roofe upon an house, and by some upon his

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Disclaimer in an Advowrie, a Writ of Right of Disclaimer lieth, but where a gift is made upon condition, it neither standeth with Law nor conscience, that the Abbot should have a more sure estate than was given him. But if the land had been given to the Abbot and Covent, to the intent to finde a lamp, or to give certain alms, reserving no re-entrie, and the words imply no re-entrie, the Feoffor nor his Heirs have no remedy, unlesse it be in case of the Statute of West. 2. which giveth the Cessavit de cantaria.

## Cap. XXXV.

By the Canon Law, if a gift of land be made to the Church upon condition, that it shall not be alienes, although the better opinion be that it may not be sold for redemption of them that be in captivity under Infidels, yet it is held, that it may be alienes for the greater advantage of the house, for it cannot be understood but the intent of the giver was so; And they call the condition, Conditio turpis. But by our Law (as this case must be judged after the Law of the Realm, and no other Law) if the condition be good, it restrains alienations for the causes abovesaid, as well as for any other. And although it be a ground in the Law, that if a Feoffment be made to a common person upon condition, that the Feoffee shall alien to no man, that the condition is void, because it is repugnant to the purity of the estate of Fee simple; And an Abbot, that

that hath lands to him and his Succeſſors, hath as perfect an eſtate in Fee ſimple, as a common perſon that hath to him and his heirs, yet there is this diverſity concerning their alienations, for when lands be given to an Abbot and his Succeſſor, the intent of the Law, and alſo of the giver (as is to be preſumed) is that it ſhould remain to the houſe for ever, and therefore it is called a Mortmain, viz. a dead hand, which letteth not a thing go whereon it hath taken hold, and therefore the Law will ſuffer the condition to be good there, though it prohibit the ſame upon a Feoffment made to a man and his heirs. And ſuch a condition is good upon a gift in tail, becauſe the Statute prohibiteth that no alienation be made thereof: Then the condition ſupra being good, it muſt be taken generally as the words be general, and it ſhall not be taken in Law, that the intent of the giver was otherwiſe than is expreſſed in his gift: (So in conſcience) If the condition had been ſpecial, that it ſhould not be alienedto A. Then is it to be taken according to the words, and may be alienedto any other, and if they be alienedto one not excepted, he may alien to him which is excepted, for Conditions in defeaſance of an eſtate be taken ſtrictly in the Law, and without equity.

## Cap. XXXVI.

Diverſities of the Civil Law, who ſhall preſent, if the Patron preſent not within ſix moneths, which hold not in our Law. If in our Law the Patron preſent not within ſix moneths of the avoidance, or of notice, where notice is neceſſary, the Biſhop ſhall preſent by Laps (unleſſe the King be Patron.) If the Biſhop preſent not within ſix moneths, the Metropolitan hath other ſix moneths, and if he fail within his time limitted by the Law, the King ſhall after preſent by his prerogative, for the King is Patron Paramount of all Benefices within this Realm. Although the time be devolute to the Ordinary or Metropolitan, yet hath the Patron liberty to preſent at any time before they have collated, and the Biſhop or Metropolitan are bound to admit his Clerk. (B. Hereupon it followeth, that ſo long as the Church is void, the Patron that is diſturbed ſhall have his Q. impedit: for Plenartie is no plea, unleſſe it be by ſix moneths before the Writ purchaſed, for him that pretendeth to be intereſſed as Patron: But where the Biſhop or Metropolitan have preſented by Laps, there Plenarty, though it be but by a day before the preſentation of the Patron, is a good plea.) But if the preſentation be fallen to the King, Nullum tempus occurrit Regi. Where a preſentment is devolute to the Metropolitan, himſelf ſhall put in the Clerk,

and

and not the Ordinary: So that there lyeth no remedy for the Patron against the Ordinary, if he receive not his Clerk. In a Writ of Right of Advowson, the Tenant shall be summoned by the Church, because there the Advowson is in demand: Otherwise it is in a Q. impedit, for there the presentment is only in debate, so that there he cannot be summoned by the Church, more than if it were in a Writ of Annuity, where the common return is, Clericus est & beneficiatus, non habens Laicum feodum ubi potest summoneri. Neither may he be attached or distrained there. The right of presentments is a temporal thing, and it belongeth to the Kings Laws to determine, who ought to present, and within what time: So of avoidances, as by the Parsons being created a Bishop, or acceptance of another Benefice without dispensation, resignation, or deprivation. But the examination of the ability of a Clerk belongeth to the Spiritual Jurisdiction, viz. to the Ordinarie And these claims stand well with the Law of God. The King may defer the presentment to a Benefice that is devolute unto him by Laps, as he may to one that is of his own Patronage, Quia nullum tempus, &c. But then the Ordinarie may place one to serve the Cure, as he may when other Patrons are slack in their presentments.

Cap.

## Cap. XXXVII.

By the Civil Law the collation to all Benefices and Dignities holding in the Court of Rome, or within two days journey thereof in coming or going thither, and of the servants of the Pope, belong to the Pope, &c. But in our Law, the King and other Patrons have the Presentments, as appeareth in the 26. Chapter. And the plea of the right of Presentments belonged to the King and his Crown, and the said Law to the contrary bound not here. Moreover, the Statute of 25. E. 3. against prohibitions and reservations of spiritual dignities by the Pope, being a general Statute, was understood also of Benefices holding within the Court of Rome: And the said Statute stood with conscience.

## Cap. XXXVIII.

By the Civil Law if a man borrow an House, and an house fall upon him, if it were likely to fall, he that borrowed him shall bear the losse; but if not, but it be by sudden tempest or other casualty, it is taken as a chance, and the borrower discharged: So by the Common Law, if goods be used reasonably in such manner as they were borrowed for, or as it was agreed at the time of the loan, that they should

be occupied: but if they perish in default of the borrower, or be used otherwise then they were borrowed for, in what wise soever they perish, so it be not in default of the owner, it is at the peril of the borrower in Law and Conscience; but if there were no default in him, the owner is to bear the losse. Like Law where he hath goods to keep, whether for a recompense or without, but by special promise to re-deliver them safe, if he have a recompense for the keeping, he may charge himself with all chances: But if he had no consideration, it is Nudum pactum, and he is not so bound. If a man have another mans goods by Trover, if he suffer them to perish, or lose them by negligence, he is chargeable to the owner: Contrary, if they be lost by casualty, as if the house where they lay be burned, or that a party to whom he delivered them over to keep, run away with them: And these diversities hold in pledges: And where one hireth goods until a certain day, &c. By the premisses it may appear, that if a common Carrier go by wayes dangerous for robbing, or drive by night and be robbed, or if he over-charge an horse, whereby he falleth in the water and spoileth the goods, that he is chargeable for his misdemeanor; if he would not carry them, but that promise were made, that he should not be charged for his misdemeanor, the promise were void, for against reason, and so it is in all other like cases. The premisses is to be understood of goods borrowed, which may be re-delivered again: But if goods borrowed, which cannot be

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delibered again, if they be occupied, perish, as corn, wine, money, &c. (which the borrower may use as his own, by force of the loan, and must deliver back things of like nature and value for them) it is at the peril of the borrower.

## Cap. XXXIX.

By the Civil Law, a Clerk cannot give or bequeath the goods which he hath, by reason of his Church; but such only as he hath, by reason of his person: By the Law of the Realm, a Bishop of goods which he hath with the Dean and Chapter, may make no gift or bequest, but he may of such as he hath of his own by reason of his Church, or of the gift of his Ancestor, &c. Like diversity of a Dean and Chapter, Master and Brethren, except the goods be specially ordered by the foundation. An Abbot might make a gift of the goods of his Church. A Parson, Vicar, Chauntrie Priest, &c. of goods which they have by reason of their dignity, as by reason of their person, may make gifts and bequests, for goods of spiritual men are temporal in what manner soever they come to them, and must be ordered by the temporal Law, &c.

## CAP. XL.

BY the Civil Law, if a Clerk die intestate, in goods gotten by the Church, the Church shall succeed him: but of such as he hath by reason of his person, his kinsmen, &c. In our Law, if a Parson, Vicar, or Canon secular die intestate, whether the goods be gotten by reason of the Church, or of his person, the Ordinary may administer: So of such goods of a Bishop, Master of a College, Dean, &c. as in the abovesaid case they may give and bequeath, and must commit the administration to the next of kin that will desire it, as of a Lay-man: If no man desire the administration, the Ordinary may administer, and see the debts paid after such order as is limited by the Common Law; for if he administer otherwise, he is chargeable of his own goods, if there be not Assets, &c. for though it be suffered, that the Ordinary may pay pound and pound like, viz. apportion the goods amongst the Creditors after his discretion, yet by the Law he is chargeable to him that can first obtain a Judgement. But the heirs or kinsmen, by reason only that they be heirs or of kin, cannot meddle with the goods of an Intestate, except where the heirs shall have their Looms, or the children (after debts and legacies paid) a reasonable part of the goods after the custom of the country.

## Cap. XLI.

By the Civil Law, he that for money will be hired to kill any man, there called Asciſmus, may after judgement be ſlain by any man. In our Law, there is no term of Asciſmus; Neither if one intend for money received to kill a man is it Felony, till he have done the act: For intent in Felony is not puniſhable by the Common Law: Contrary in Treaſon. And if he do kill the man for mony, he ſhall be only arraigned of Murder, and if he confeſſe it, or plead not guilty, and is found guilty by xij. men, he ſhall have judgement of life and member, and ſhall forfeit his lands and goods: So ſhall he, if he ſtand mute in an appeal brought of the Murder: but for ſtanding mute upon an Indictment, he ſhall not be attainted of the Murder, but ſhall have Pain fort & dure, viz. ſhall be preſſed to death, and there he forfeits only his goods, and not his lands. But though a man be outlawed, abjured, or otherwiſe attainted of Felony, no man may kill him but by authority of Law; inſomuch, that if a man have Judgement of Pain fort & dure, and the Officer beheadeth him, or on the contrary, it is Felony: but if the Judgement be, that he ſhall be hanged in chains, and the Sheriffe hang him in ſome other thing, he is not there guilty of his death, but it is finable, becauſe he hath not followed the words of the Judgement. Any man (though no Officer) may arreſt him that is outlawed, or attainted of Fe-

lony, and bring him forth to be ordered according to the Law, and if he kill him in disobeying the arrest, he shall not be impeached for his death. But by a Capias in Debt or Trespasse directed to the Sheriffe, no man may arrest the party, but by authority from the Sheriffe, and therefore if there he kill the party in resisting, he is guilty of his death.

## Cap. XLII.

WHere the Master shall be charged for his Servant, Deputy, or them under him in any office, and first where by Statute Law. By the Statute W. 2. cap. 11. if a Keeper suffer one to goe at large, that was committed upon arrearages of accompt, an action of Debt lieth against the Keeper, if he be sufficient: But if not, against him that committed the keeping of the prison unto him. ¶ By the Statute of 1. E. 3. cap. 1. if Baylliffes of Franchises make a false retorn, the party shall have averment against it of too little issues, as of other things, as well as against the Sheriffe, but all the punishment shall be upon the Bayliffe, and not on the Lord of the Franchise: But if an under-Sheriffe make a retorn, whereupon the Sheriffe shall be amerced, the high Sheriffe shall be amerced, for the retorn is expressely in his name: But if it be a false retorn, whereupon an Action of Deceit lieth, that may be brought against the under-Sheriffe: See thereof the Statute De malè Retornantibus brevia. ¶ By the

the Statute 25. E. 3. the Kings Butler ſhall anſwer for his Deputies as for himſelf. ¶ Stat. Scaccar. No Officer of the Exchequer ſhall put any under him, but ſuch as he will anſwer for, which general words are underſtood as well of an untruth, as an ouer ſight. ¶ Stat 14. E. 3. cap. 9. appointed Gaoles again to the Sheriffe, and that he ſhall make ſuch under Gardeines, for which he will anſwer; for an eſcape the King may notwithſtanding charge the Gaoler or Sheriffe by this Statute, if he will: but for a willfull eſcape, which is felony, the Gaoler ſhall anſwer himſelf and the Aſſentants, and not the Sheriffe, W. 1. cap. 15. ¶ He that hath a Sheriffewick, Conſtableſhip, or Bailiwick in fee, whereby he hath the keeping of priſoners, if he let to Replevin thoſe not repleviſable, it is a forfeiture, if it be an under-Sheriffe or Officer that doth it without aſſent of the Lord, he ſhall have impriſonment for three years, and ſhall be after ranſomed at the Kings will: So here the Lord is not bound to anſwer the miſdemeanor of his under-Officer, but himſelf. ¶ Stat. 37. E. 3 cap. 10. vocat. Statute Staple; No Merchant or other ſhall loſe their goods for the treſpaſſe or forfeiture of their ſervant, unleſſe by the Maſters commandement, or that he offend in in the office wherein his Maſter placed him, or that the Maſter be chargeable by the Law Merchant, as in ſome place is uſed. ¶ Stat. 14. E. 3. cap. 8. Wapentakes and Hundreds ſevered from Counties ſhall be adjoyned again, and if the Sheriffe hold them

in his hand, he shall place in them Bailiffs that have lands sufficient, and for whom he will answer, and that if he let them to ferm, he let them to the ancient ferm: And after Statute 23. H. 6. cap. 10. prohibiteth that he shall not let them to ferm, now they being in the Sheriffs own hands, if he put in Bayliffs, they be but Under-bayliffs to the King, and the Sheriff high-bayliff, and they in manner the Sheriffs servants, therefore by the said Statute of E. 3. the Sheriff shall answer for them, if they offend in their office: but if the Sheriff let them to ferm, though he offend the Statute of E. 3. thereby, yet quære, whether the Sheriff there be chargeable with their misdemeanor: For by some this Statute is to be understood only where the Bayliwicks be in the Sheriffs hands, which is not so here, nor the Bayliffs his servants, but his fermors, and therefore if the Sheriff shall be charged, it is by the Common Law, and not by the Statute. ¶ Stat. 2. H. cap. 14. That Officers by Patent in every of the Kings Courts, that by vertue of their office have power to make Clerks in the said Courts, shall be charged and sworn to make such for whom they will answer. ¶ West. 2. cap. 43. Hospitallers and Templers be prohibited, they hold no plea belonging to the Kings Courts, on pain of dammages to the partie grieved, and ransom to the King, the Superiors shall answer for their obediences, as for their own deed. ¶ Stat. 14 H. 6. cap. 1. The Sergeant of the Bataile shall satisfie all debts, dammages, and

executions

executions recovered against any purveyor, or Chator under him, and that offend the Statute 36. E. 3. or this Statute (if they be sufficient) and the Plaintiffe shall have a Scire facias against the said Sergeant to have execution. ¶ Stat. Merchant, If a man be committed to prison upon a Statute Merchant by the Maior, before whom, &c. and the Gaoler will not receive him, he shall answer the debt, if insufficient, he that committed the Gaole unto him. ¶ Stat. West. 1. cap. 30. If outragious toll be taken in a Town Merchant, if it be the Kings Town let to ferm, the King shall have the Franchise of the Market into his hands: If it be done by the Lord of the Town, the King shall do in like wise: If by the Bayliffe unknowing the Lord, he shall yeeld again that received, and suffer forty dayes imprisonment: So here the Lord shall not answer for the Bayliffe. And in all cases supra, where the superior is charged for the inferior, the inferior is bound in conscience to restitution, except the obedienter supra, for that all that he hath is the superiors, if he will take it. ¶ Cases where after the Common Law, the Master shall be charged for the act of his servant. For trespasse of battery, entry into lands, felonie or murder, not unlesse by his Commandement. ¶ For money borrowed in his Masters name, not unlesse it come to his use, and that by his assent: So of a Contract, unlesse by the Masters commandement, or that it come to his use by his assent. The Master sendeth the servant to a Fair or Market to buy things, without appointing of whom, the Master is chargeable:

able: Contrary, if the ſervant buy them in his own name, unleſſe the things bought come to the Maſters uſe. ¶ The Maſter ſendeth a thing defective to the Market to be ſold generally, no action of Deceit lieth againſt the Maſter: Contrary, if to be ſold to ſuch a man. ¶ If the ſervant keep the Maſters fire negligently, whereby the Maſters houſe is burnt, and his neighbours alſo, the Maſter is chargeable: Contrary, if the ſervant bear fire in the ſtreet negligently. ¶ If a ſtranger deſire to lodge with one that is no common Hoſtler, and a ſervant there robbeth his chamber, the Maſter is not chargeable: Contrary of a common Hoſtler. ¶ Two impriſoned, the one upon an execution for money, the other for felony, a ſervant of the Gardeine wilfully ſuffereth both eſcape, the Maſter is anſwerable for the debt, and finable to the King for the other as a negligent eſcape, and the ſervant alone anſwerable to the felony, for the willfull eſcape. ¶ A man makes his generall receiver, if he receive money of a Debtor and makes him an acquittance, but payeth not the money over to the Maſter, the Debtor is diſcharged: But an acquittance without payment were no bar to the Maſter, unleſſe he gave him authority by writing to make acquittances, and then the authority muſt be ſhewed: but if the ſervant there accept an horſe, it is no diſcharge, unleſſe it be delivered over, and the Maſter agreeth to it, for the receiver hath no power to make ſuch commutation, unleſſe by ſpecial commandement. ¶ A ſervant unſent receiveth money due to his

his Master, as sent by him, no discharge, if it come not to the Masters use by his assent. ¶ A Bayly of a Manor payes a quite rent to a Grantee of the Seigniory, it doth not counterbail an Attornment, although the grant were by fine, neither bindeth the Master without his own Attornment: but if the Lord be disseised of his Seigniory, and the Bayly payeth the rent to the heir of the Lord, it is a good seisin, though without commandement of his Master, for it belongeth to his office to pay rent services: Contrary of rent charges. ¶ An incrochment by payment of a Bayly, without commandement of the Master, bindeth not the Master. ¶ Lord, Mesne, and Tenant of a Manor, the Tenant alieneth, the Feoffee tendreth notice, and payeth his rent to the Bayly of the Mesne, it changeth not his avowry, unless the Baylies receit were by his special commandement. ¶ A servant in his Masters business rides on his Masters horse to a Town, that may attach goods upon a plaint of debt, and in a plaint of debt against the servant, the Masters horse is attached, the servant appeareth not, the Officers seise the Masters horse, as forfeited, trespasse lieth for the Master. ¶ An Hoast, or Keeper of a Tabern are not chargeable for their guests, unless for that done by their assent.

CAP.

## Cap. XLIII.

The Civil Law admitteth no property of goods in a Villeine, and therefore determineth his gift of them to be void. In our Law, a Villeine hath as perfect a property in his goods, and may as lawfully give them as a free man. But if the Lord seise them before the gift, the Villeine his interest is determined. If the Lord seise part in name of the whole goods, his Villeine hath or hereafter shall have, it is good only for such as the Villeine hath at the time, &c. If the Lord only claim the goods, and seise no part, the claim is void, and the gift of the Villeine is good notwithstanding. If the Lord seise an Obligation, wherein one is bound to his Villeine, it is the Lords, but not to use any action upon, but in the name of the Villeine, therefore if the Villeine release, the Lord is barred. A Neif marrieth a free man, by the intermariage her goods be the husbands, and it is too late for the Lord to seise: And although the husband die, and the goods come again to the wife as Executor to her husband, the Lord cannot seise them, and yet she is Neif as before the marriage. (B.) If the Neife purchase lands before the inter-marriage, and now the Lord enters, and after the husband hath issue by his wife, yet he shall not be Tenant by the Curtesie: Contrary, if the issue were born before entry; for after issue the avowrie shall be made upon the husband sole, and if the wife die, the

possession

poſſeſſion is veſted in the husband by the Law, and not in the heir, and he is Tenant to the Præcipe. The Statute 19. H. 7. That the Lord ſhall enter into lands, whereof others are ſeiſed to the uſe of his Villeine, as it ſeemeth, ſhall alſo be underſtood of goods in uſe. If a Villeine be made Prieſt, the Lord may ſeiſe his lands and goods, as before, and the Villeine until ſeiſure may alien, as before: And now the Lord may cauſe him to do him ſuch ſervice as is fit for a Prieſt before any other: but may put him to no labor, but that which is honeſt and lawful for a Prieſt to do. If a Villeine enter into Religion, in his year of probation, he may alien, or the Lord ſeiſe his goooods, as before he took the habit upon him: but if after he make his Executors, and be profeſſed, otherwiſe it is. Neither may the Lord in that caſe ſeiſe his body, or put him to labor, but muſt ſuffer him to abide in his Religion; And the remedy of the Lord is only by an Action againſt the Soveraign for receiving him without his licence, whereby he ſhall recover ſuch dammages, as a Jury ſhall aſſeſſe: And Conſcience agreeth with the Law herein.

## CAP. XLIV.

BY the Civil Law, if a Clerk be promoted to the title of his patrimony, and the ſame be expreſſely aſſigned to him, and by him accepted for a title, it ſhall goe as into a thing of the Church, and may not be alienedexcept

except he have after another Benefice, whereof he may live: Contrary if it be secretly assigned, &c. In this Realm all inheritances must be ordered by the Kings Lawes: and if a Clerk accept his patrimony for a title, yet it may be aliened or charged, as before, for inheritances cannot be bound by the Ordinary, nor yet by the party; but by Fine, or other matter of Record, Feoffment, &c. or at least by a bargain which changeth an use. And to assign an estate for life to him that hath a fee simple in the land is void, unlesse it be by such matter that it work by Conclusion or Estoppel, as here it doth not. And if the Clerk alien (as there is no interest for life, years, or otherwise, but may be aliened by the Law) if after he sue in the Spiritual Court to recover it again, a Prohibition or Præmunire lieth. And the Law of the Realm must in many cases be observed in Conscience, as well as in the judicial Courts.

## Cap. XLV.

The xlv. Chapter consists of divers questions taken out of the Civil and Canon Lawes.

## Cap. XLVI.

Ignorantia Juris excuseth in few cases, for every man at his peril is bound to take notice of the Law, both Statute and Common Law. But ignorantia facti may excuse in many

many cases. If a Statute penal be made, and it is enacted that it shall be proclaimed before such a day in every Shire, and it is not proclaimed accordingly, yet he that offendeth it is punishable, unless there were farther words, that the Proclamation be not made, that no man shall be bound: The reason, for that no Statute is made, but by the assent of the Lords Spirituall and Temporall, and all the Commons (viz. Knights of the Shire, Citizens and Burgesses, chosen by assent of the Commons, to represent the whole state of the Commons) then all being present by presumption of Law, no Proclamation needeth; so that the words of proclaiming are but of favour of the makers, whose intent cannot be taken, that the Statute should be void, if it were not proclaimed: But by some, if before the day limited for the Proclamation one offend, he shall not be punished, Quære, but admitting the Law so, it is not for that ignorance of the Law excuseth him, but the intent of the makers. The Statute 7. R. 2. cap 6. is that every Sheriffe shall proclaim the Statute of Winton three times every year in every Market Town, to the intent the offenders may not be excused by ignorance. And admit the intent of the Statute (according to the opinion of some) to be that no forfeiture shall grow against them that were ignorant, but Proclamation were made, yet they are excused by the said particular Statute, and not by the generall rules of the Law. But indeed that Proclamation is never made, so that by such exposition the Statute of

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Winchester should be of little force: Therefore by some the intent of the Statute of R. is only that the forfeiture may be taken in conscience as well as in Law. In divers Statutes, they that be ignorant be excused by the same Statutes. As by the Statute 13. R. 2. cap. ultim. If any person take a Benefice by Probition, that he shall be banished, and forfeit all his goods, and that if he be in the Realm, he avoid within six weeks after he hath accepted it, and that none shall receive him after the six weeks, upon like forfeiture, if he have knowledge, &c. So he that receiveth him having no knowledge, is excused by the expresse letter. So he that offendeth against Mag. Chart. is not excommenged, but he have knowledge that it is prohibited that he doth; for they be only excommunicated by the sentence called, Sententia lata super chartas, that do it willingly: Or doing it ignorantly, correct not themselves within fifteen dayes after warning. So a man may be excused ut supra, sometimes by the intent of the makers of a Statute: But there are few cases where a man shall be excused by the ignorance of the Law only, except it might be applyed to Infants. An Infant of the age of discretion shall not be punished where the Statute gives a corporal pain, but it is not his ignorance that excuseth him: for though he know the Statute, and wilfully offend it; As in pleading Joyntenancy by deed, which is found against him, or plead a Record, &c. in an Asset and fails of it at the day, he shall not be punished, but the intent of the makers, which the

Law

Law presumeth was, that an Infant should not have that corporal punishment. And yet it is thought that an Infant shall forfeit the penalty of a Statute: As if he had not been excepted in the Statute of Forjudger, it had bound him: So of Celler levying a close: Or if being a Gaoler, he suffer an escape, he shall pay the debt, for that the Statutes be generall: Like Law will that be may by a Statute penal lose his goods. Also by an old Maxim for avoiding of murders and felonies, if an Infant of the age of discretion doe a murder or felony, he shall be punished as one of age: So of Trespasse: Which cases run upon the ground, where an Infant shall be punished, and where not, for the tendernesse of his age, though he be not ignorant, and not upon the ground of Ignorance.

## Cap. XLVII.

Cases where Ignorantia facti excuseth, and where not. If a man buy an horse in open market of one that hath no property, not knowing but that he hath right, the buyer hath good right to the horse, and his ignorance excuseth him, contrary if he had known he had no right, or if he had bought him out of market overt. A reteiner of another mans servant, not knowing of the former reteiner, is excused by ignorance, both against the common Law, as also against the Statute of 33. E. 3. by the intent of the makers, that one ignorant of the former reteiner should not incur the penalty:

So of him that reteines another mans Ward, not knowing he is Ward. If the Tenant after homage due make a Feoffment, and the Lord not knowing thereof distrains for the homage, ignorance shall excuse him of dammages in a Replevin, though he cannot avow for the homage. If a man be bound in Obligation to repair the houses of the Obligee, as often as need shall require during such a time, and after the houses need reparation, though the Obligor know it not, in that he hath bound himself to it, he is to take notice at his peril, and ignorance excuseth not: But if the condition had been to repair such houses, as the Obligee should assign, and after he assigneth, &c. but the Obligor hath no notice of the assignment, that ignorance excuseth; for 5th he that should make the assignment is party to the Deed, he is bound to give notice of his own assignment, contrary if the assignment had been appointed to a stranger, there the Obligor must have taken notice at his peril. If a man buy lands or goods, whereunto another hath title, ignorance excuseth him not. If a servant come with his Masters horse to a Town, where by custome they may attach goods for debt, and upon a plaint against the servant, the Masters horse is attached as the servants, by information of the Plaintiffe, ignorance excuseth not the Officer, for where a man will enter into lands, seise goods, distrain, &c. he must at his peril see it be lawfully done. So if a Sheriffe upon a Replevin deliver other beasts then were distrained,

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though by information of the party that diſtrained, Treſpaſſe lieth; for he ſhall be compelled (as commonly all Officers be) to execute the Kings Writ at his peril, according to the tenor thereof, and to ſee that the act which he doth be lawfully done: But if upon a Summons in a Præcipe, the Sheriffe by information of the Demandant ſummon the Tenant in another mans land; for that he doth not in that caſe make any entry or ſeiſure of the land, but only ſummon the Tenant, and the Writ doth not command him to ſummon the Tenant upon his own land, but generally to ſummon him, and then by an old Maxim it ſhall be in Terra petita, which he being ignorant of, the information ſufficeth him as to his entry. (B.) But where he makes an entry, and delivers ſeiſin in execution, or ſeiſeth any thing, theſe muſt be done at his peril, on pain to render damnages.

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## Cap. XLVIII.

The Law prohibiteth them that be arraigned upon an Indictment of felony or murder to have counſell: which is reaſonable, in that it is farther, that in all things that pertain to the form of pleading, the Judges ſhall ſo inſtruct the parties, that they incurre no damage thereby. As if one would plead, that he never knew the party ſlain, or never had penyworth of the goods ſuppoſed to be ſtollen, they are bound in Conſcience

to inform him, that he must take the generall issue non culpable: for otherwise it were unreasonable to prohibit them counsell, and to drive them then to plead according to the strict formalities of the Law, which they know not. But in an Appeal, though the Justices of favour will most commonly help forth the party, and sometimes his counsel, as they do many times in Common Pleas in the form of pleading, yet might they bid them plead at their peril, for no Law bindeth them to instruct him there, but that they may doe as they think best: But if the Appealee be poor, and have no counsell, they must assign him counsel, if he ask it. And in the case of an indictment supra, there is no difference though he be a common offender, or by presumption guilty, but the Justices ought to give him that the Law alloweth him, as if he ask Sanctuary, or plead Mainmer, or have some Record to plead, as Autre fois arraine & acquite de mesme le felony, which he cannot doe formally: But if the Justices know that the party is guilty, as also that his plee is untrue, they may bid him plead at his peril, contrary if they doe but imagin it. The reason why counsel is admitted in an Appeal, and not upon an Indictment, is for that commonly it is to presume that the Appellor hath great malice against the Appellee, as when an Appeal is brought by the wife of the death of her husband, or by the son of the death of his father, or that an Appeal of robbery is brought for stealing goods, therefore if the Judges should instruct the Appellee, the Appellant would grutch

gruteth, and think them partiall, wherefore as well for the indemnity of the Court, as of the party, if he be not guilty, the Law sufferetth him to have counsell: But an Indictment, being at the Kings suit, the King intendeth nothing but Justice with favour, and therefore he will be content the Justices help forth the party, as far as Reason and Justice may suffer, upon which reason it began, that upon an Indictment they should have no counsell, as it seemeth, which is now grown into a Maxim.

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## Cap. XLIX.

A Man seised of lands in fee, hath issue two sons, the elder goeth beyond sea, and is commonly reported to be dead, the father dieth, the younger entreth as heir, and alieneth with Warranty, and dieth without issue, the elder returneth, this Collaterall Warranty bars him by a Maxim in Law, though he have no Assets, &c. So also it seemeth in conscience, for it is as old a Law, that such a Warrantie shall barre the heir, as that the inheritance shall descend to the eldest son, and then Conscience followeth the Law in both cases alike: And this Maxim might have a lawfull beginning; for it seemeth not against reason, that a man should be bound by the act of his Ancestor, to whom he is heir; for like as by the Law he shall have advantage by the same Ancestor, and shall have his lands by descent, if he have any right; so is it not

unreasonable, though the Law, for the nearity of blood that is between them, suffer him to have a disadvantage by the same Ancestor? But if the Maxim were that it should be a barre, though he were not heir unto that Ancestor, it were to be taken as against the Law of Reason, for it could have no reasonable beginning. If the father binde him and his heirs in an Obligation, and die, the son is not bound unlesse he have Assets by descent from his father: The cause for that the Maxim of the Law is none other, but that he shall be charged if he have Assets, &c. but if it had been without Assets, it would have stood with Conscience. Like Law where a man is vouched as heir, he may enter as he that hath nothing by descent; But where he claimeth the land in his own right, the Warranty of his Ancestor shall rebut him, though he have no Assets from him.

## CAP. L.

FEoffee of a Disseisor knowing of the Disseisin, procureth a release with Warranty of an Ancestor collateral to the Disseisee, which Ancestor also knoweth of the right of the Disseisee, and the Ancestor dieth, and the Warranty descends, this barreth in Law as in the precedent case; for if upon every surmise, releases, or other writings should come in triall, whether they were made with conscience or not, they should be of small effect; For avoiding of which inconvenience the Law will

will drive the party only to answer whether it be his deed or not, and not whether it were made with conscience or not, and though the party may be at a mischief thereby, yet the Law will rather suffer that mischief, than the said inconvenience. So if a woman, for fear of her husband, levy a fine, yet the woman after her husbands death shall not be received to shew the matter, in avoiding of the fine, for the inconvenience that should follow thereby: And it is thought there is no remedy neither in Chancery in these cases; for that where the Common Law, in cases concerning Inheritances, putteth the party from any averment, for eschewing an inconvenience, that if the same inconvenience should follow in the Chancery, if the same matter should be pleaded there, that no Subpena should lie, and as much delayes and costs will grow to the party here, if he should be put to answer unto them in Chancery, as if at the Common Law. Yet it seemeth, that inasmuch as he knoweth the Warranty was obtained by covin against conscience, he is in conscience, and by the Law of reason, to restore the land, or recompense the party, though no Subpena lye, as in the case of a Fine with Nonclaim supra, cap. 14.

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## Cap. LI.

By the Common Law, goods wrecked upon the Sea were immediately forfeited to the King, but now by the Statute of W. 1. cap. 4.

If a man, dog, or cat, come alive unto the land, out of the Ship or Barge, the owner hath a year and a day to come in and prove his property, which if he do, they shall not be judged as wreck, but he shall have them; but if he come not in, they shall remain to the King: And the Common Law, and consequently the Statute stands with equity, for the Law must needs reduce the property of all goods to some man, and when the goods are wrecked, it seemeth the property of them is in no man, and if the property should remain in the Owner, percase he would never claim them, and then it should not be known, who ought to take them, by which means they might perish, wherefore it is reasonable that the Law appoint who ought to have them, which it hath done to the King, as Soveraign over the people. But if a man waive his goods, and saith he forsaketh them, yet by the Law the property remains in him, and he may seise them after, when he will: If any man in the mean time put those goods in safeguard, to the use of the Owner, he doth lawfully, and shall be allowed his reasonable expences in that behalf; As he shall be of goods found. But shall have no property in them, more than in goods found. If a man prescribe, that if he finde goods within his Manor, that he shall have them as his own, it is a void prescription, for it is against reason, and can have no lawfull beginning, as it might in the case of wreck supra: which is, The King by the old custome of the Realm, as Lord of the narrow seas (as it is said)

ſaid) is bound to ſcowze the Seas of Pirats and petty Robbers, as King Edgar did twice in the year, which becauſe it cannot be done without great charge, it is not unreaſonable that he have goods wrecked towards the ſame: But it is not meant, that the King ought to ſafe conduct the Merchants upon the Sea againſt outward enemies. So note a man may loſe his goods, and no default in him: As where beaſts ſtray, and be taken up and proclaimed, and the Owner hath not heard of them within the year and day: So where a man killeth another with the ſword of I. S. the ſword is forfeited for a Deodand, &c.

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## Cap. LII.

A Jury between party and party after they be ſworn, and before they be agreed of their verdict, may not eat or drink, but by licenſe of the Court; The beginning of which Maxim was for the avoiding of divers inconveniences, eſpecially that they ſhould not do it at the coſts of the parties, therefore if they eat, it may be alleadged in arreſt of Judgement: But with the aſſent of the Juſtices, they may both eat and drink, which maketh the Law reaſonable. For if any of them fall ſick before they be agreed, ſo that he cannot common of the verdict, he may have meat, drink, and other neceſſaries by aſſent of the Juſtices, and his fellowes alſo, at their own coſts, or at the indifferent coſts of the parties, if the parties ſo agree, but not at the coſts of one

one party alone. Also if the Jury can in no wise agree, and that appeareth to the Justices upon examination, they may suffer them both to have meat and drink for a time, to see if they can agree: If they will not then agree, the Justices may take such order as shall stand with reason and conscience, by setting a fine upon the obstinate parties heads, or otherwise, as they think fit, and awarding a new Inquest: like as they may doe if one of the Jury die before verdict, &c.

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## Cap. LIII.

Moyes given in Ass. trespasse, &c. though commonly they be untrue, are given for this cause: There is a Maxim, that if the Defendant or Tenant in any action plead a plee that amounteth to the generall issue, that he shall be compelled to take the generall issue, and if he will not, he shall be condemned for lack of answer. The general issue in Ass. is Nul tort nul disseisin. In a Writ of Entry in nature of an assise, Ne disseisa pas: In Trespasse, Non culp. So every action hath his generall issue assigned by the Law, and the Tenant must of necessity either take that general issue, or plead in abatement of the Writ, to the Jurisdiction, to the person, some bar, or some matter by way of conclusion. Therefore if I. S. infeoffe I. D. and a stranger bringeth an ass. against I. D. whose title I. D. knoweth not; if he should be compelled to plead

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to the point of the Aſſiſe, viz. Nul tort nul diſſeiſin, the matter ſhould be put in the mouths of twelve Lay men unlearned in the Law: Wherefore it is better the Law be ſo ordered, that it be put in the determination of the Judges: And if the ſaid I. D. ſhould plead in barre that I. S. was ſeiſed, and him infeoffed, by force whereof he entred, Judgement ſi aſſiſe, that plee were not good; for inaſmuch as it amounteth but to the generall iſſue, he ſhall be compelled to take the generall iſſue ut ſupra, therefore to the intent the matter may be ſhewed and pleaded before the Judges, rather than before the Jury, the Tenants uſe to give the Plaintiffe a colour of action, whereby it ſhall appear, that it were hurtfull to the Tenant to put the matter that he pleadeth to the judgement of twelve men. The moſt common colour is, when he hath pleaded ut ſupra, that I. S. infeoffed him, he doth plead farther and ſay, that the Plaintiffe claiming in by colour of a Deed of Feoffment made by the ſaid I. S. before the Feoffment made to the Defendant, where nothing paſſed by the Deed entred, upon whom the Defendant entred, Judgement ſi aſſiſe; In this caſe, becauſe it appeareth to be a doubt to Lay men, whether the land paſſe by the deed without livery or not, therefore the Law ſuffereth the Tenant to plead that ſpeciall matter, to bring the matter to the determination of the Judges: And the Judges may not put the Tenant from the plee, for that as Judges they know not, but that it is true; ſo there is no default in the Court, neither any in the Tenant,

Tenant, who doth it to a good intent, for though the Jury upon a generall issue may finde the truth, yet it is more danger, for fear of perjury, for them to inquire of many points than of one, and he loveth not his neighbour as himself, that offereth such danger unto him, where he may well keep it from him, if he will follow the order of the Law, upon which reason colours may well stand with conscience also: And sometimes the Judges will induce the Tenant unto it, to the intent aforesaid. Mendacium perniciosum, jocosum, & officiosum, their differences.

## Cap. LIV.

The pleading in an Ass. to confesse no Mulier, is in this manner: When the Tenant hath pleaded, that such a man was seised, and infeoffed him, &c. and given a colour to the Plaintiffe, that he claiming in by colour of a Deed of Feoffment made by the said Feoffor, where nothing passed by the Deed entred, then the Tenant useth to say further, upon whom A. B. entred, upon whom the Tenant entred, where in deed the said A.B. never entred: And the cause of this manner of pleading is, for that if the Tenant by his pleading confesse an immediate entry upon the Plaintiffe, or putting out of the Plaintiffe called an Oustier, then if after, the title be found for the Plaintiffe, the Tenant by his confession were attainted of the Disseisin, and it may be that though the Plaintiffe have good title,

that

that yet the Tenant is no Diſſeiſor. And there is no default in the Court, nor in the Law, for they know not that it is untrue, and little or no default in conſcience in the Tenant or his Counſell, in this manner of pleading, eſpecially if his Counſel know that he is no Diſſeiſor. If a man that hath ſecretly in the night ſtollen an horſe, be indicted thereof at the Kings ſuit, the form is in the indictment, to ſuppoſe that he ſuch a day and place with force and arms, that is to ſay, with ſtaves, ſwords, and knives, &c. feloniouſly ſtole the horſe againſt the Kings peace, which form muſt be kept, though the Felon had no weapon: And that there is no untruth in ſuch an Indictment is thus proved: It is not alleadged in the Indictment by matter in deed, that he had ſuch a weapon, for the form is this; Inquiratur pro Domino Rege ſi A. B. tali die & anno apud talem locum vi & armis, viz. gladiis, &c. talem equum talis hominis felonicè cepit, &c. And then the Jury is only charged with the effect of the bill, viz. whether he be guilty or not of the felony within the Shire, and not whether he be guilty modo & forma, as in the bill is ſpecified, and ſo when they ſay billa vera, they ſay truly, as they take the effect of the bill to be: So is it though the bill vary from the day, year, and place, ſo it vary not from the Shire: As if there were falſe Latine in the bill, they might well ſay billa vera, for their verdict ſtretcheth but to the Felony, and not to the truth of the Latine. So if the party ſupra being an action of treſpaſſe for his horſe taken, as

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he may though the horſe were taken feloniouſly, for every Felony is a treſpaſſe and more, and declare that the Defendant took the horſe with force and arms, there is no untruth in the Plaintiffe, for that every treſpaſſe is in the Law done with force and arms, ſo that if he be attainted of the treſpaſſe, he is conſequently attainted of the force and arms, ſo the Plaintiffe ſaith truly, as the Law meaneth to be force.

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## Cap. LV.

The Statute of 45. E. 3. That a Prohibition ſhall lie where a man is impleaded in Court Chriſtian for Diſmes of wood ſof the age of twenty years or above, by the name of Sylva cedua, is but a confirmation of the Common Law, which preſcription and Statute are good, for they are neither againſt the Law of God, nor of Reaſon: And like Law is of the lop and bark of trees of ſuch growth, as of the trees. And it ſeemeth, that before the Statute, Diſmes ſhould be paid by the Common Law of no trees, though the Statute now permit them to be paid of trees within the age of twenty years, in ſuch places where by preſcription Diſmes have been paid thereof; for the cutting down is not the increaſe, but the deſtruction of trees: Contrary of corn and graſſe, for if they be not yearly cut down, they come to nothing, ſo the cutting of them is the increaſe and preſervation thereof: So of the killing of beaſts, &c. Alſo

tithe

tithe of wood doth not serve as a certain and yearly sustentation of the Curate, for which tithes were ordained, for that is no yearly, but an uncertain profit: And if a man cut not down his corn, hay, &c. he is in conscience bound to recompense the Parson: Otherwise it is, if he cut not down his woods. Also a prescription within a certain limit to pay tithes of no manner trees though under twenty years growth, nor of corn or hay, so the Curate be otherwise provided for, is good: for although Dismes (taken as a competent provision for the Curate) be by the Law of Reason, the tenth part is by a Law of the Church, which may be altered: (Note a prescription is good, De modo decimandi, sed non de non decimando.) But one man cannot prescribe to be quit of tithes for his land in D. when all the rest of the inhabitants in D. pay tithes: for the Curates care being no lesse for him than for the rest of the Parish, there is no reason therein, unlesse he fully recompense the tenth part otherwise. (B. Note a Custom cannot be particular, but in a whole Countrey or Town) But in these cases supra, if the party be impleaded in Court Christian for his very tithes, a Prohibition lieth not; for where it doth appear by the Libell, that the Ecclesiasticall Court ought to hold plea, a Prohibition lieth not: Contrary it is, where it appeareth in the Libell, that they ought not to hold plea, as of timber trees, &c. But if a Parishioner, having made a composition with Parson, Patron, and Ordinary, to pay certain quarters of wheat to the Parson

Parſon and his ſucceſſors, for the tithe of ſuch a ground, if after the tithes be demanded in the Spiritual Court, as they fall, Quære whether a Prohibition lie, but clearly in the caſe of Preſcription it lieth not. All tithes are either Prædiall, by ſome called Prædiall immediate, becauſe they come meerly of the increaſe of the ground, Perſonall, as that is which cometh all of the induſtry and labour of the perſon, as an Annuity pro conſilio, the gains upon buying and ſelling, &c. Or elſe mixt tithes, as Calves, Lambs, &c. by ſome termed Prædiall mediate, becauſe they come partly of the earth, and partly of the induſtry of the perſon. In prædiall and mixt Tithes the charges are never deducted: But otherwiſe it is of perſonall Tithes. Tithes are paid ſometimes twice of one thing, as of Lambs, and of the wooll of the ſame Sheep; but then it is for another increaſe. If a man buy corn upon the ground, the buyer ſhall pay the tithe, and not the ſeller. By ſome, of tin, coal, nor lead, no tithe ſhall be paid, for that they are part of the Freehold, as trees alſo are annexed to the Freehold, and not of the increaſe of the Freehold: Alſo they are uncertain profits, &c.

THE END.

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1/11/15